(16,655.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 154.

THE NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES DE LACEY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 Be it remembered that on the 18th day of April, 1893, there was duly filed in said circuit court of the United States for the district of Washington, western division, a bill of complaint in words and figures as follows, to wit:

In the Circuit Court of the United States in and for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACEY, Defendant. } No. —.

Complaint.

The plaintiff, Northern Pacific Railroad Company, a corporation duly organized and existing under and by virtue of an act of Congress of the United States of America, approved July 2nd, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," complains of the defendant James De Lacey, a citizen and resident of the State of Washington, and for cause of complaint says:

I.

2 That the plaintiff is the owner of and entitled to immediate possession of the following-described lands, to wit: The southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter and the east half of the southwest quarter of section twenty-one, township twenty north, range three east of Willamette meridian, in Pierce county, State of Washington, which said lands are of great value, to wit, of the value of twenty thousand dollars and more.

II.

And the plaintiff says that the defendant, without the permission of plaintiff and without any color of title thereto, has unlawfully and wrongfully entered upon said above-described lands and now unlawfully and wrongfully withholds possession of said lands from the plaintiff to the great damage of plaintiff.

Wherefore plaintiff demands judgment for the possession of said above-described lands and for — dollars damages for the withholding of the same from plaintiff, together with its costs and disbursements herein.

ASHTON & CHAPMAN,
Attorneys for Plaintiff.

F. M. DUDLEY, *Of Counsel.*

STATE OF WASHINGTON, } ss:
County of Pierce, }

Paul Schulze, being first duly sworn, on oath deposes and says that he is the general land agent of The Northern Pacific
3 Railroad Company, the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that he believes the same to be true.

PAUL SCHULZE.

Subscribed and sworn to before me this 18th day of April, 1893.

[NOTARIAL SEAL.] W. O. CHAPMAN,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

Filed April 18, 1893.

A. REEVES AYRES, *Clerk,*
By CLARA M. KENT, *Deputy.*

And afterwards, to wit, on the 18th day of April, 1893, there was duly issued out of said court a summons in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff, }
vs.
JAMES DE LACY, Defendant. }

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court, in the city of Tacoma, Pierce county, State of Washington.

Summons.

The President of the United States of America to James De Lacey, Greeting:

4 You are hereby required to appear in the circuit court of the United States, ninth judicial circuit, district of Washington, western division, at the city of Tacoma, within twenty days after the day of service of this summons upon you, if served in said county of Pierce; or if served in any other county, then within thirty days after the day of service, and answer the complaint of the above-named plaintiff, now on file in the office of the clerk of said court, a copy of which complaint is herewith delivered to you. And unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 18th day of April, in the year of our Lord one thou-

sand eight hundred and ninety-three, and of our Independence the 117th.

[SEAL.] A. REEVES AYRES, *Clerk*,
By CLARA M. KENT,
Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE, }
District of Washington. }

I hereby certify that I received the within writ on the 18th day of April, 1893, and personally served the same on the 18th day of April, 1893, by delivering to and leaving with James De Lacey, said defendant named therein, personally, at his place of
5 residence, near Fern Hill, county of Pierce in said district, together with a copy of the complaint attached thereto.

THOS. R. BROWN,
U. S. Marshal,
By D. G. LOVELL, *Deputy.*

Marshal's Fees.

Serving summons and complaint.....	$4 00
Mileage	48
	$4 48

(Endorsed:) Filed April 8th, 1893. A. Reeves Ayres, clerk.

And afterwards, to wit, on the 8th day of May, 1893, there was duly filed in said court, in said cause, a demurrer to complaint in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff, }
vs. } No. —.
JAMES DE LACEY, Defendant. }

Demurrer to Complaint.

Now comes the defendant, James De Lacey, and demurs to the complaint of plaintiff in above cause, for the following reasons, to wit:

6 1st. That the complaint does not state facts sufficient to constitute a cause of action.

Dated April 19th, 1893.

BALLARD & NORRIS,
Attorneys for Defendant, Room 204 *Cal. Block,*
Tacoma, Washington.

I, H. F. Norris, one of the attorneys for the above-named defendant, hereby certify that in my opinion the above demurrer to plain-

tiff's complaint in said above cause is well founded in point of law.

Witness my signature this 19th day of April, 1893, at Tacoma, Wash.

H. F. NORRIS,
Attorney for Defendant.

Filed May 8, 1893.

A. REEVES AYRES, *Clerk*,
By CLARA M. KENT.

And afterwards, to wit, on Wednesday, the 17th day of May, 1893, the same being the 32nd judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

Order Overruling Demurrer.

This cause coming on to be heard on the demurrer of the defendant to the complaint, the court having heard the arguments of counsel and being fully advised in the premises—

7 It is ordered that said demurrer be, and the same is hereby, overruled; and the defendant is given 30 days in which to answer.

And afterwards, to wit, on the 16th day of June, 1893, there was duly filed in said court, in said cause, an answer in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACY, Defendant. } No. —.

Answer.

Now comes the defendant, James De Lacy, and files this, his answer, to the complaint of the plaintiff, herein, and for his answer charges and avers:

First.

Defendant admits the corporate capacity of the plaintiff as stated in said complaint; and that defendant is a citizen and resident of the State of Washington, and in Pierce county, said State.

Second.

The defendant denies that the plaintiff is the legal or equi-
8 table owner of the land described in the first paragraph of said complaint, and denies that the plaintiff is entitled to the

possession of said land, or any part thereof; and defendant admits that said premises are of the value of twenty thousand dollars, ($20,000.00) and more, to wit, the sum of one hundred thousand dollars ($100,000.00).

Third.

Defendant admits that defendant is in possession of the land described in said first paragraph of plaintiff's said complaint, that he went into possession of same in April, 1886, without permission of plaintiff, but denies that he is in possession of said premises without color of title thereto; denies that defendant unlawfully and wrongfully entered upon said premises and denies that defendant now unlawfully and wrongfully withholds possession of said lands from the plaintiff, to the damage of said plaintiff, or otherwise.

Fourth.

Defendant denies that plaintiff is entitled to judgment for the possession of said described lands, or for damages in the sum of — dollars.

Fifth.

Stricken.

Defendant admits the land-grant act of Congress of July 2nd, 1894, under which the plaintiff, as a railroad company, claims ownership to the lands in controversy, to wit:

9 The east one-half of the southwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section numbered twenty-one, in township numbered twenty north of range numbered three east of the Willamette meridian, according to the United States Government survey.

Stricken.

And avers that the said land is embraced within the grant and within the withdrawal issued by the Land Department under said grant, and avers that said described lands were excluded from the grant by reason of a pre-emption filing thereon, made April 9th, 1869, by John Flett by his D. S. 1227, which said filing remained upon the records of the Land Department at Washington, D. C., undetermined and uncanceled, a *prima facie* good and valid pre-emption filing at the date of withdrawal on general route, to wit, on August 13th, 1870, and at the date of the filing of the map of definite location, to wit, on May 14th, 1874, and that by reason of such fact said land was excepted from the operation of said grant, and plaintiff obtained no title or interest in or to said land, and had not, at the commencement of this action, any right, title, or interest in said land, either in law or equity.

And defendant, for a further answer to the complaint of the plaintiff, herein, and for his affirmative defense to said complaint, charges and avers:

I.

That on April 9th, 1869, one John Flett, a citizen of the
10 United States, over the age of 21 years, and in all respects a qualified pre-emptor under the laws of Congress, having made settlement as required by law, filed his pre-emption declaratory statement, numbered 1227, for the east half of the southwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section numbered twenty-one, in township numbered twenty, north of range numbered three, east of the Willamette meridian, according to United States Government survey, alleging settlement on said land as of April 7th, 1869.

That on said date, to wit, April 7th, 1869, said land was unoffered land situated in Pierce county, then Territory, now State of Washington, and in the land district of public lands, subject to sale and entry, at the land office at Olympia, Washington Territory.

That said declaratory filing was legally and properly made, the fees required by law paid, and receipt and certificate then and there issued to said John Flett, dated April 9th, 1869, and said pre-emption entry was, by the proper officers at said land office, allowed, entered upon the records and plats of the local land office at Olympia, W. T., duly reported to the General Land Office of the United States at Washington, District of Columbia, and entered upon the books and plats of said General Land Office, to all of which said books, records, and plats defendant makes reference as a part of this his affirmative defense.

II.

That under the aforesaid declaratory statement, No. 1227,
11 the said John Flett improved and occupied said land until the year 1871.. That in the fall of 1870 said John Flett attempted to make his final proof under said filing, and was refused by the local land office at Olympia, for the alleged reason that said land was within the grant of July 2nd, 1864, to said plaintiff, The Northern Pacific Railroad Company.

III.

Stricken. That subsequently, to wit, July 15th, 1887, such further proceedings were had under said declaratory statement No. 1227, of said John Flett that notice of intention to present final proof was made by the local land office at Olympia.

IV.

Stricken. That in 1883 one John Algyr made application to file upon said land as public land and tendered a declaratory statement, sworn to, as required by law, and tendered the proper fees at said local land office at Olympia, W. T., which was refused by the officers of said local land office, and said John Algyr appealed, all of which facts appear of record in the General Land Office at Washington, D. C., to which records reference is hereby made.

V.

That subsequently, to wit, on and prior to April 9th, 1886, James De Lacy, this defendant, being at the time a resident upon said land, over the age of 21 years, having his wife and family present with him, and having filed his declaration of intention to become
12 a citizen of the United States, and being a qualified pre-emptor, did, on said day, to said local land office at Olympia, Territory, now State, of Washington, the same being the proper land office for the land district within which said land is situated, and said James De Lacy, being then and there legally entitled to make homestead entry of said land under the laws of the United States, having previously made settlement thereon, offered to make homestead filing on said land as unoccupied public land subject to pre-emption and homestead entry, and tendered his written statement in form as required by law, the same being duly and properly sworn to, together with all proper and legal fees of said land office for such complete filing and entry, all of which was refused by said local land office and was so refused by the local officers of said land office, for the alleged reason that said lands were within the scope of the grant from Congress to the Northern Pacific Railroad Company, of date July 2nd, 1884, and said James De Lacy, this defendant, appealed to the General Land Office at Washington, D. C., all of which facts appear of record in the office of the Commissioner of the General Land Office at Washington, D. C., to which reference is hereby made.

VI.

Stricken.

That the said James De Lacy, this defendant, entered his protest and contest of all claims of said John Flett and John Algyr under the D. S. 1227, of said John Flett, and the attempted filing of John Algyr, all of which appears of record in the said General Land Office, to which reference is here made.

13 VII.

That said John Flett, never having made final proof under said D. S., 1227, and never having resided upon or improved said land since 1871, forfeited all rights to make such final proof, and said pre-emption filing remained upon the records, books, and plats of the General Land Office of the United States from said April 9th, 1869, pending contest in the local and General Land Office of the United States, until December 23rd, 1891, when same was, for the first and only time, canceled of record and in fact, all of which appears in the records of the General Land Office, and to which records a reference is now made.

VIII.

That the plaintiff herein claims to own said lands by virtue of an act of Congress of the United States granting lands to the said plaintiff to aid in building a line of railroad from Duluth, in Minnesota, to the Puget sound in Washington Territory, by the northern route'

approved July 2nd, 1864, plaintiff claiming that said land, hereinbefore described, were within the scope of said grant, and conveyed to plaintiff thereby. That in truth and in fact the act if Congress of May 31st, 1870, declared the line of said railroad along the valley of the Columbia river to Portland, Oregon, thence to Puget sound (at Tacoma), to be the main line of said Northern Pacific railroad under said grant.

Stricken.

IX.

That the map of general route of said main line was filed
14 and order of withdrawal issued by the Land Department of the United States, as provided in said grant, on August 30th, 1870, at which time the pre-emption filing of said John Flett, D. S., No. 1227, was a valid pre-emption filing upon said — hereinbefore described, as shown by the record books and plats of the General Land Office of the U. S., to which books, records and plats reference is made, and said filing—D. S., No. 1227—was then a legal, valid, uncanceled pre-emption claim to said lands, and, as defendant avers, excepted said land from the operation of said grant.

X.

That the line of definite location of said main line of said railroad was filed, as provided by said act, on May 14th, 1874, and that said line was embraced within the limits of withdrawal of August 13th, 1870, and within the limits of map of definite location (route) of May 14th, 1874, of the main line of said railroad, and on said dates the pre-emption filing of said John Flett—D. S., No. 1227—was a legal, valid, existing and uncanceled pre-emption claim as record- in the General Land Office of the United States, and reference is made to such records and plats; and as defendant avers, such uncanceled pre-emption claim excluded said lands from said grant as definitely located on said main line of said railroad.

XI.

That at all times since April 9th, 1869 (and which was prior to map of general route of plaintiff's main and branch lines of said railroad, under said act of Congress of July 2nd, 1864), the aforesaid pre-emption filing of said John Flett—D. S.,
15 No. 1227—has been a legal, valid, uncanceled, pre-emption claim, of record in General Land Office at Washington, D. C., until canceled on December 23rd, 1891.

Stricken.

That the Land Department recognized the validity thereof and the rights of said John Flett thereunder; and that plaintiff, The Northern Pacific Railroad Company, for the first time, in June 16th, 1897, made formal claim to and entered protest and contest therefor, and on the final hearing of said contest in United States land office the receiver made a finding of facts, and as a conclusion of law determined in favor of said John Flett under said D. S., No. 1227, and ordered that he make his final proof under the law, and on his failure so to do that said land be

Stricken.

awarded to James De Lacy, this defendant, under his homestead claim. This opinion was entered July 27th, 1889, and now appears of record in the General Land Office at Washington, D. C., to which reference is made.

XII.

Stricken.

That on appeal from the aforesaid ruling of the local land office to the Commissioner of the General Land Office, all parties being represented, said Commissioner made a finding of facts from the evidence, and as his conclusion of law finds that said John Flett is entitled, under his aforesaid declaratory filing No. 1227, to make final proof and receive patent
16 from the department for said aforesaid land; that said opinion of Honorable Lewis A. Groff, Commissioner of the General Land Office, was filed December 5th, 1889, as shown by the records of the General Land Office at Washington, D. C., to which a reference is here made.

XIII.

Stricken.

That under said act of Congress of July 2nd, 1864, all lands to which the homestead, pre-emption, or other claims had attached, at the date of general withdrawal—August 13th, 1870—was excluded from said grant to plaintiff, and by the provisions of said grant said plaintiff, The Northern Pacific Railroad Company, was entitled to select lands in lieu thereof out of certain other lands, as therein provided, and defendant avers and charges the fact to be that the plaintiff, well knowing the facts from the records of the General Land Office, treated the lands in controversy as Government lands sold, as excluded from said grant, and so advertised same on all their official land maps under said grant, and on information and belief charge that said plaintiff, Northern Pacific Railroad Company, did file claim for lieu lands instead thereof, and that the same were selected, and the selection approved by the Land Department of the United States; all of which appears on said official map of said railroad company, and upon the records of the Land Department in the General Land Office in Washington, D. C., to which records and maps reference is made.

17 XIV.

That said land in controversy in this suit was and is within the limit of the grant on main line of plaintiff's railroad, as declared by act of Congress of May 31st, 1870, and that said lands have been occupied by this defendant and his family, as their only home under their aforesaid homestead claim; that they have resided thereon constantly since their first settlement, in April 9th, 1886; that defendant has cleared, grubbed out, and cultivated portions of said land; that the land is good agricultural land, and productive for agricultural purposes; that defendant has erected, at great cost and expense, a good dwelling-house in addition to his first house erected

thereon, in which defendant and family now reside; that defendant's improvements upon said land, made by him thereon for the use of himself and family, and in the improvement and betterment of said land, has cost him, and are of the value of seven thousand dollars ($7,000.00); that by reason of the defendant's occupancy and the cultivation of said lands, and the growth of the country surrounding, and especially the growth of the city of Tacoma, near which city said land is situated, said lands have increased in value from about sixteen hundred ($1,600.00), at the time defendant made his settlement and claimed his homestead right thereon, to about the *some* of one hundred *dollars* dollars ($100,000.00), the present value thereof.

XV.

That defendant, on or about the 29th day of April, 1892, went to the local land office at Olympia, Washington, he having at
18 that time constantly resided upon said land (claiming the same as his homestead under the law, and his aforesaid offering to make his said entry and filing thereon), and improved and cultivated same for more than five years, as is provided by the homestead laws in force, and demanded the register and receiver of said local land office to issue the notice provided by law fixing the time and place where defendant should produce his witnesses to make final proof, which was refused, for the alleged reason that the said land was covered by the aforesaid land grant.

XVI.

That on the 29th day of April, 1892, defendant went to said local land office at Olympia, Washington, and offered to make an additional and amended application for said land, setting up the additional ground that said land was within the grant of the main line fixed by act of Congress of May 31st, 1870, and of the withdrawal of August 13th, 1870, and for these reasons excluded from the grant aforesaid, and tendered the proper fee for making the homestead filing, which was refused, and defendant on the 25th day of November, 1892, gave notice of appeal from the order making such refusal to the Commissioner of the General Land Office at Washington, D. C., which appeal has not been heard by said Commissioner to the knowledge of this defendant.

Stricken.

The opinions of the register and receiver of the local
19 land office, together with findings of fact, are now on file in the General Land Office at Washington, D. C., as are also the findings made by the Commissioner of the General Land Office in his opinion, heretofore rendered, to which aforesaid opinion and findings reference is here made.

Defendant further charges and avers that on or about the 13th day of December, 1892, and pending defendant's appeal as hereinbefore pleaded, plaintiff procured to be issued to plaintiff, under said land grant, a patent, regular in form, and dated and signed December 13th, 1892, purporting to convey said land to plaintiff;

that said patent was duly recorded January 18th, 1893, in the office of the county auditor of Pierce county, Washington, in Record of Deeds, vol. —, at page —, and this defendant avers that said patent was illegally and unlawfully issued, for the aforesaid reason that said land, so intended to be conveyed thereby, was, in fact and in law, excluded from the grant aforesaid of July 2nd, 1864, and said patent, in law, is void for that reason.

That this defendant is the head of a family; is over the age of 21 years; had in 1886, and now has, the lawful right to make his homestead entry, as tendered and offered April —, 1886, when this defendant and his family entered upon, improved and claimed said land as their homestead, under the homestead laws of the United States; that at said time said land was unoccupied public land of the Government, subject to homestead entry; that defendant
20 and his family have continuously lived on said land, improving and cultivating the same up to this time; that said defendant and his family went into possession of said land peaceably, and have remained in undisturbed possession thereof until now; that defendant has made lasting and permanent improvements thereon, and that said improvements are of the value of seven thousand dollars ($7,000.00) and more; that by reason of said improvements and the growth of the country surrounding it said land is now of the value of one hundred thousand dollars ($100,000.00) and more, and this defendant alleges that he has the legal and equitable right to the possession of said premises, and the legal and equitable right to proceed and make his final proof and procure to himself a conveyance of said premises by patent under the homestead laws of the United States.

Defendant now prays a judgment and an order of this court declaring said patent to be void, and that it conveyed no title to said lands to plaintiff; that plaintiff is not entitled to said land, nor the possession thereof; that plaintiff take nothing by this suit, and that defendant have judgment for his costs in this behalf.

Defendant further prays that said patent be canceled, and that this defendant be decreed to be rightfully in possession *to* said land under his homestead claim, and for such other and further relief as defendant may be entitled.

And defendant, as in duty bound, will ever pray.

BALLARD & NORRIS,
Attorneys for Defendant.

21 STATE OF WASHINGTON, } ss:
County of Pierce, }

I, James *Le* Lacy, being duly sworn, on oath states: I am defendant in the foregoing-entitled action; that the foregoing answer to plaintiff's complaint in said suit and signed by my attorneys, Messrs. Ballard & Norris, was read over by me and is understood by me, and that the statements, averments and allegations of said answer are true, as I verily believe.

JAMES DE LACEY.

Subscribed and sworn to before me by James De Lacy this 30th day of May, 1893.

[NOTARIAL SEAL.] HOMER F. NORRIS,
Notary Public in and for said State of Washington,
Residing at Tacoma, Pierce County, Washington.

Received copy of foregoing answer this June 16th, 1893.
ASHTON & CHAPMAN,
Attorneys for Plaintiff.

Filed June 16th, 1893.
A. REEVES AYRES, *Clerk.*

And afterwards, to wit. on the 5th day of July, 1893, there was duly filed in said court, in said cause, a motion to strike in the words and figures as follows, to wit:

22 In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACEY, Defendant.

Motion to Strike Out.

Comes now the plaintiff herein and moves the court for an order striking from the answer of the defendant certain parts and portions thereof, as follows, to wit:

I.

Granted.

Moves to strike from the fifth paragraph of said answer the following words, to wit: "Admits the land grant of Congress, of July 2, 1864, under which the plaintiff, as a railroad company, claims ownership to the lands in controversy, to wit, east half of the southwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section numbered 21, in township numbered 20 north, of range numbered 3, east of the Willamette meridian, according to the United States Government survey," for that the same is incompetent, immaterial, irrelevant, and surplusage.

23 II.

And moves to strike from the fifth paragraph the following words, to wit: "And avers that said described lands were excluded from the grant by reason of a pre-emption filing thereon, made April 9th, 1869, by John Flett by his D. S., 1227," for that the same are incompetent, immaterial, irrelevant, and surplusage, and state a conclusion of law.

III.

Granted.

And moves to strike from said fifth paragraph the words following, to wit: "Which said filing remained upon the records of the Land Department at Washington, D. C., undetermined and uncanceled, a *prima facie* good and valid pre-emption filing at the date of withdrawal on general route, to wit, on August 13, 1870, and at the date of the filing of the map of definite location, to wit, on May 14, 1874," for that the same are immaterial, incompetent, surplusage; and because as to whether or not said filing was "*prima facie* good and valid pre-emption claim," at the dates named, is a conclusion of law.

IV.

Granted.

And moves to strike from said fifth paragraph of said answer, the following words, to wit: "That by reason of such fact, said land was excepted from the operation of said grant, and plaintiff obtained no title or interest in or to said land, and had not, at the commencement of this action, any right, title, or interest in said land, either in law or equity," for that the same are incompetent and surplusage, and states a conclusion of law.

V.

And moves to strike from said first paragraph of the further answer and affirmative defense in said answer contained the following words, to wit: "That on April 9, 1869, one John Flett, a citizen of the United States, over the age of 21 years, and in all respects a qualified pre-emptor under the laws of Congress, having made settlement, as required by law, filed his pre-emption declaratory statement, numbered 1227, for the east half of the southwest quarter, southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section numbered twenty-one in township numbered twenty, north of range numbered three, east of the Willamette meridian (according to the United States Government survey), alleging settlement on said land as of April 7, 1869," for that the same are immaterial, irrelevant, incompetent, and surplusage.

VI.

And moves to strike from said first paragraph of said further answer and affirmative defense in said answer contained the following words, to wit: "That said declaratory filing was legally and properly made," for that the same state a conclusion of law. And further moves to strike from said paragraph the words: "The fees required by law paid, and receipt and certificate then and there issued to said John Flett, dated April 9, 1869, and said pre-emption entry was, by the proper officers at said land office, allowed, entered upon the records and plats of the local land office at Olympia, W. T., duly reported to the General Land Office

at Washington, District of Columbia, and entered upon the books and plats of said General Land Office, to all of which said books, records, and plats defendant makes reference as a part of this, his affirmative defense," for that the same are immaterial, incompetent, and surplusage.

VII.

And moves to strike out all the second paragraph in said further answer and affirmative defense in said answer contained, for that the same is immaterial, incompetent, and surplusage.

VIII.

And moves to strike out the third paragraph of said further answer and affirmative defense in said answer contained, for that the same is immaterial and surplusage.

Granted.

IX.

And moves to strike out the fourth paragraph of said further answer and affirmative defense in said answer contained, for that the same is immaterial, irrelevant, and surplusage and for the further reason that whether or not said statement was sworn to as required by law is a conclusion of law.

26

X.

And moves to strike out from the fifth paragraph of said further answer and affirmative defense in said answer contained the following words, to wit: "That subsequently, to wit, on and prior to April 9, 1886, James De Lacey, this defendant, being at the time a resident upon said land, over the age of 21 years, having his wife and family present with him, and having filed his declaration of intention to become a citizen of the United States, and being a qualified pre-emptor, did, on said day, go to said local land office at Olympia, Territory (now State) of Washington, the same being the proper land office for the land district within which said land is situated, and said James De Lacey, being then and there legally entitled to make homestead entry of said land under the laws of the United States, having previously made settlement thereon, offered to make homestead filing on said land as unoccupied public land subject to pre-emption and homestead entry," for that the same is immaterial, irrelevant, and surplusage; and because that whether or not said defendant, De Lacey, was a qualified pre-emptor, or was then and there legally entitled to make homestead entry for said land, under the laws of the United States, is a conclusion of law.

XI.

And moves to strike out from said paragraph 5 of said further answer and affirmative defense the following words, to wit: "And tendered his written statement in form as required by law,
27 the same being duly and properly sworn to, together with all proper and legal fees of said land office for such complete

filing and entry," for that the same state a conclusion of law, and are immaterial, irrelevant, and surplusage. And further moves to strike out from said fifth paragraph the words: "All of which was refused by said local land office, and was so refused by the local officers of said land office for the alleged reason that said lands were within the scope of the grant from Congress to the Northern Pacific Railroad Company of date July 2, 1864," for that the same are immaterial, irrelevant, and surplusage. And further moves to strike from said paragraph the following words, to wit: "And said James De Lacey, this defendant, appealed to the General Land Office at Washington, D. C.," for that the same are immaterial, irrelevant, and surplusage. And further moves to strike out the words: "All of which facts appear of record in the office of the Commissioner of the General Land Office at Washington, D. C., to which reference is here made," for that the same are immaterial, irrelevant, vague, and indefinite.

XII.

Granted. And moves to strike out the sixth paragraph of said further answer and affirmative defense in said answer contained, for that the same is immaterial, irrelevant, incompetent, and surplusage.

XIII.

And moves to strike from the eighth paragraph of the further answer and affirmative defense in said answer contained the
28 words: "Forfeited all rights to make such final proof," for that the same state a conclusion of law. And moves to strike out the further words: "And said pre-emption filing remained upon the records, books, and plats of the General Land Office of the United States from said April 9, 1869, pending contest in the local and General Land Offices of the United States, until December 23, 1891, when the same was, for the first and only time, canceled of record and in fact," for that the same are immaterial, irrelevant, and surplusage, and state evidentiary matter. And further moves to strike out all of said paragraph seven of said further answer and affirmative defense in said answer contained, for that the same is incompetent, irrelevant, and surplusage.

XIV.

And moves to strike from the eighth paragraph of the further answer and affirmative defense in said answer contained, the words: "That the plaintiff herein claims to own said lands by virtue of an act of Congress of the United States granting lands to the said plaintiff to aid in building a line of railroad from Duluth, in Minnesota, to the Puget sound in Washington Territory, by the northern route, approved July 2, 1864, plaintiff claiming that said

Granted. land, hereinbefore described, was within the scope of said grant, and conveyed to plaintiff thereby," for that the same are incompetent, irrelevant, and surplusage. And further moves to strike from said paragraph the following words, to wit: "That in truth and in fact the act of Congress of May 31,

Granted.

1870, declared the line of said railroad along the valley
29 of the Columbia river to Portland, Oregon, thence to Puget sound (at Tacoma), to be the main line of said Northern Pacific railroad under said grant," for that the same are irrelevant, immaterial, and surplusage, and state a conclusion of law.

XV.

And moves to strike from the ninth paragraph in said further answer and affirmative defense, in said answer contained, the words: "At which time the pre-emption filing of said John Flett, D. S., No. 1227, was a valid pre-emption filing upon said land hereinbefore described, as shown by the record books and plats of the General Land Office of the United States, to which books, records, and plats reference is made; and said filing—D. S., No. 1227—was then a legal, valid, uncanceled pre-emption claim to said lands, and, as defendant avers, excepted said land from the operation of said grant," for that the same are irrevelant, incompetent, immaterial, and surplusage, and a conclusion of law. And further moves to strike out all of said paragraph, for that the same is immaterial, irrelevant, and surplusage.

XVI.

And moves to strike out from the tenth paragraph of said further answer and affirmative defense in said answer contained the words: "And on said dates the pre-emption filing of said John Flett—D. S., No. 1227—was a legal, valid, existing, and un-
30 canceled pre-emption claim of record in the General Land Office of the United States, and reference is made to such records and plats; and, as defendant avers, such uncanceled pre-emption claim excluded said lands from said grant as definitely located on said main line of railroad," for that the same state a conclusion of law, and are immaterial, irrelevant, and surplusage. And further moves to strike out all of said paragraph, for that the same is immaterial, irrelevant, and surplusage.

XVII.

Granted.

And moves to strike from the eleventh paragraph of said further answer and affirmative defense in said answer contained the following words: "That at all times since April 9, 1869 (and which was prior to map of general route of plaintiff's main and branch lines of said railroad, under said act of Congress of July 2, 1864), the aforesaid pre-emption filing of said John Flett—D. S., No. 1227—had been a legal, valid, uncanceled pre-emption claim, of record in General Land Office at Washington, D. C., until canceled on December 23, 1891," for that the same state a conclusion of law, and are incompetent, immaterial, irrelevant, and surplusage. And further moves to strike from said paragraph the words: "That the Land Department recognized the validity thereof and the rights of said

John Flett thereunder; and that plaintiff, The Northern Pacific Railroad Company, for the first time in June 16, 1887, made formal claim to and entered protest and contest
31 therefor," for that the same are immaterial, irrelevant, and surplusage. And further moves to strike from said paragraph the words: "And on the final hearing of said contest in United States land office the receiver made a finding of facts, and as a conclusion of law determined in favor of said John Flett under said D. S. No. 1227, and ordered that he make his final proof under the law, and on his failure to do so that said land be awarded to James De Lacey, this defendant, under his homestead claim," for that the same are immaterial, irrelevant, and surplusage, and the matter therein is evidentiary in character. And further moves to strike from said paragraph the words: "This opinion was entered July 27, 1889, and now appears of record in the General Land Office at Washington, D. C., to which reference is made," for that the same are immaterial, irrelevant, and evidentiary in character.

Granted.

XVIII.

And moves to strike out the twelfth paragraph of said further answer and affirmative defense in said answer contained, for that the same is immaterial, irrelevant, surplusage, and incompetent, and the matter therein is evidentiary in character.

XIX.

And moves to strike from the thirteenth paragraph of said further answer and affirmative defense in said answer
32 contained the words: "That under said act of Congress of July 2, 1864, all lands to which the homestead, pre-emption, or other claims had attached, at the date of general withdrawal—August 13, 1870—were excluded from said grant to plaintiff, and by the provisions of said grant said plaintiff, The Northern Pacific Railroad Company, was enti-led to select lands in lieu thereof out of certain other lands, as therein provided," for that the same state a conclusion of law, and are immaterial and irrelevant. And further moves to strike out the words: "And defendant avers and charges the fact to be that the plaintiff, well knowing the facts from the records of the General Land Office, treated the lands in controversy as Government lands sold and as excluded from said grant, and so advertised same on all their official land maps under said grant," for that the same are irrelevant, immaterial, and surplusage. And further moves to strike from said paragraph the words: "And on information and belief charge that said plaintiff, Northern Pacific Railroad Company, did file claim for lieu lands instead thereof, and that the same were selected and the selection approved by the Land Department of the United States; all of which appears on said official map

Granted.

of said railroad company, and upon the records of the Land Department in the General Land Office at Washington, D. C., to which records and maps reference is made," for that the same are irrelevant, immaterial, and evidentiary in
33 character. And further moves to strike out all of said paragraph 13 for that the same is immaterial, irrelevant, and surplusage.

Granted.

XX.

And moves to strike from the fourteenth paragraph of said further answer and affirmative defense in said answer contained the words: "That said land in controversy in this suit was and is within the limit of the grant on main line of plaintiff's railroad, as declared by act of Congress of May 3, 1870," for that as to whether or not the act of May 31, 1870, or any act of Congress declared a grant for said plaintiff, is a conclusion of law; and for that said allegation is irrelevant, immaterial, and surplusage. And further moves to strike from said paragraph the words: "That said lands have been occupied by this defendant and his family as their only home under their aforesaid homestead claim; that they have resided thereon constantly since their first settlement in April 9, 1886; that said defendant has cleared, grubbed out, and cultivated portions of said land," for that the same are immaterial, irrelevant, and surplusage. And further moves to strike from said paragraph the words: "That defendant has erected, at great cost and expense, a good dwelling-house, in addition to his first house erected thereon, in which defendant and family now reside; that defendant's improvements upon said land, made by him thereon for the use of himself and family, and in the improvement and betterment of said land, has cost him, and are of the value of seven thousand dollars
34 ($7,000); that by reason of defendant's occupancy and cultivation of said lands and the growth of the country surrounding, and especially the growth of the city of Tacoma, near which city said land is situated, said lands have increased in value from about sixteen hundred dollars ($1,600) at the time defendant made his settlement and claimed his homestead right thereon, to about the sum of one hundred thousand dollars ($100,000), the present value thereof," for that the same are immaterial and surplusage.

XXI.

And moves to strike out the fifteenth paragraph of said further answer and affirmative defense in said answer contained, for that the same is immaterial, irrelevant, and surplusage, and the matter therein stated is evidentiary in character.

XXII.

Sentence first part of 22.

And moves to strike from the sixteenth paragraph of said further answer and affirmative defense everything up to and including the words: "The opinions of the register and receiver of the local land office, together with findings of fact, are now on file in the General Land Office at Washington, D. C., [illegible] are also the findings made by the Commissioner of the Ge[illegible]ral Land Office in his opinion, heretofore rendered, to which aforesaid opinions and findings reference is here made," for that the same is immaterial and irrelevant. And further moves
35 to strike from said paragraph the words: "And this defendant avers that said patent was illegally and unlawfully issued, for the aforesaid reason that the land so intended to be conveyed thereby was in fact and in law excluded from the grant aforesaid of July 2, 1864, and said patent in law is void for that reason," for that the same state a conclusion of law, and are immaterial and surplusage. And further moves to strike from said paragraph the words: "That this defendant is the head of a family; is over the age of 21 years; had in 1886, and now has, the lawful right to make his homestead entry, as tendered and offered April —, '86, when defendant and family entered upon, improved, and claimed said land as their homestead, under the homestead laws of the United States; that at said time said land was unoccupied public land of the Government, subject to homestead entry; that said defendant and his family have continuously lived on said land, improving and cultivating the same up to this time; that said defendant and his family went into possession of said land peaceably, and have remained in undisturbed possession thereof until now; that defendant has made lasting and permanent improvements thereon, and that said improvements are of the value of seven thousand dollars ($7,000) and more; that, by reason of said improvements and the growth of the county surrounding it, said land is now of the value of one hundred thousand dollars ($100,000) and more," for that
36 the same are immaterial, irrelevant, and surplusage. And further moves to strike from said paragraph the words: "This defendant alleges that he has the legal and equitable right to the possession of said premises, and the legal and equitable right to proceed and make his final proof and procure to himself a conveyance of said premises by patent under the homestead laws of the United States," for that the same is frivolous, in that it appears therefrom that he has not the legal right or title to the premises, and for the further reason that the same states a conclusion of law, and is immaterial, irrelevant, and surplusage.

Sentence first part of 22.

Sentence first part of 22.

ASHTON & CHAPMAN,
F. M. DUDLEY,
Attorneys for Plaintiff.

Filed July 5th, 1893.

A. REEVES AYRES, *Clerk.*

And afterwards, to wit, on the 12th day of July, 1893, there was duly filed in said court in said cause an amended answer in the words and figures as follows, to wit:

37 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACEY, Defendant.

Amended Answer.

Now comes the defendant, James De Lacey, and, under the order of this court heretofore made, files this his amended answer to the complaint of the plaintiff herein, and for his amended answer charges and avers:

First.

Defendant admits the corporate capacity of the plaintiff as stated in said complaint, and that the defendant is a citizen and a resident of the State of Washington, and of Pierce county, said State.

Second.

The defendant denies that the plaintiff is the owner of the land described in the first paragraph of said complaint, and denies that the plaintiff is entitled to the possession of said land, or any part thereof, and defendant admits that said premises are of the value of twenty thousand ($20,000.00) dollars, and more, to wit: the sum of one hundred thousand ($100,000.00) dollars.

38 Third.

Defendant admits that he is in possession of the land described in said first paragraph of plaintiff's complaint; that he went into possession of the same in April, 1886, without permission of plaintiff, and denies that he is in possession of said premises without color of title thereto, and denies that he is unlawfully or wrongfully upon said premises, and denies that the defendant now unlawfully and wrongfully withholds possession of said land from the plaintiff, to the damage of said plaintiff or otherwise.

Fourth.

Defendant denies that plaintiff is entitled to judgment for the possession of the aforesaid lands or for damages in the sum of — dollars.

The defendant for further answer to the complaint of plaintiff herein, and for his affirmative defense herein, charges and avers:

I.

That on April 9th, 1869, one John Flett, a citizen of the United States, over the age of 21 years, and in all respects a qualified pre-emptor under the laws of Congress, having made settlement as required by law, filed his pre-emption declaratory statement, No. 1227, for the east half of the southwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section No. twenty-one (21), township No. twenty (20), north of range No. three (3), east of the Willamette meridian, according to the Government survey, alleging settlement on said land as of April 7th, 1869.

39 That on said date, to wit, April 7th, 1869, said land was unoffered Government land, situated in Pierce county, Territory of Washington, and in the district of public lands subject to sale and entry at the United States local land office at Olympia, Washington Territory.

That said declaratory filing was legally and properly made, the fees required by law paid, and register's receipt and certificate of such entry then and there issued to said John Flett, dated April 9th, 1869, and said pre-emption entry was by the proper officers at said local land office allowed, entered upon the records, and plats of the local land office at Olympia, W. T., duly reported to the General Land Office of the United States, at Washington, D. C., and entered upon the books and plats of said General Land Office, to all of which said books, records, and plats defendant makes reference as a part of this, his affirmative defense herein.

II.

That under the aforesaid declaratory statement, No. 1227, the said John Flett occupied and improved said land and cultivated the same until the year 1871; that said John Flett attempted to make his final proof under his aforesaid filing, and was refused by the local land office at Olympia, W. T., for the alleged reason that said land was within the grant of July 2d, 1864, to the Northern Pacific Railroad Company.

III.

That subsequently, to wit, on and prior to April 9th, 1886, James De Lacey, this defendant, being over the age of 21 years and

40 having filed his declaration of intention to become a citizen of the United States, and being in all respects a qualified pre-emptor, and having made previous settlement on said land, did, on said day, go to said local land office at Olympia, Washington Territory, aforesaid, the same being the proper land office where the land district in which said land aforesaid was situated, and said James De Lacey being then and there legally entitled to make homestead entry of said land under the laws of the United States, offered to make homestead filing on said land as unoccupied public land, subject to pre-emption and homestead entry, and tendered his writ

ten statement in form as required by law, the same being duly sworn to, together with all proper and legal fees of said land office for such complete filing and entry, tendered the same to the register and receiver of said local land office, and demanded of them to make his homestead filing upon the land aforesaid, all of which was refused by said local land office, and was so refused by the register and receiver of said office for the alleged reason that said lands were within the scope of the grant from Congress to the Northern Pacific Railroad Company, of date July 2nd, 1864, and the said James De Lacey, this defendant, appealed from such order of refusal to the Commissioner of the General Land Office *of* Washington, D. C., all of which facts appear of record in the office of the Commissioner of the General Land Office at Washington, D. C., to which reference is hereby made.

IV.

That said John Flett, never having made final proof under
41 said dec. statement, No. 1227, and never having resided upon or improved said land since 1871, forfeited all his rights to make such final proof as required by law, and said pre-emption filing remained upon the records, books, and plats of the General Land Office of the United States from said April 9th, 1869, pending contests in the local and General Land Office of the United States until December 23rd, 1891, when the same was for the first and only time, canceled in fact and of record, all of which appears in the records of the General Land Office at Washington, D. C., and to which records reference is here made.

V.

That the plaintiff herein claims to own said lands by virtue of an act of Congress of the United States, granting lands to the Northern Pacific Railroad Company to aid in building a line of railroad from Duluth, in Minnesota, to the Puget sound, in Washington Territory, by the northern route, approved March 2nd, 1864, and make no other claim to said lands.

VI.

That the map of general route of the main line of said railroad company was filed July 30th, 1870, and an order of withdrawal issued by the Land Department of the United States, as provided in said grant, on August 13th, 1870, at which time the pre-emption filing of said John Flett—D. S., No. 1227, aforesaid—was a valid pre-emption filing upon said lands as hereinbefore described, as shown by the records, books, and plats of the General Land Office of the United States, to which books, records, and plats reference is here made, and said pre-emption filing aforesaid was then
42 legal, valid, uncanceled pre-emption claim to said lands, and defendant avers such filing and claim excepted said lands from the operation of said grant.

VII.

That the line of definite location of said main line of plaintiff's railroad was filed as provided by said act on July 30th, 1870, and that the lands aforesaid were embraced within the limits of the order of withdrawal of August 13th, 1870, and within the limits of definite location of route of July 30th, 1870, of the main line of said railroad, and on said dates the pre-emption filing of said John Flett aforesaid was a legal, valid, existing, and uncanceled pre-emption claim of record in the General Land Office of the United States, and was never canceled by the Land Office of the United States until in 1891, and reference is made to such record and plats in the General Land Office aforesaid. And the defendant avers that the aforesaid uncanceled pre-emption claim excluded said lands aforesaid from the said grant of July 2nd, 1864.

VIII.

That the lands in controversy in this suit, and heretofore described in the amended answer, *was* and are within the limits of the grant to plaintiff on main line of plaintiff's railroad, as declared by act of Congress of May 31st, 1870, and that said lands have been occupied by this defendant and his family as their only home under their aforesaid homestead claim; that they have resided thereon constantly since their first settlement thereon, April 9th, 1886; that defendant has cleared, grubbed, and cultivated a large portion of said
43 lands; that the lands aforesaid are good agricultural lands, and productive for agricultural purposes; that defendant has erected, at great cost and expense, a good dwelling-house and other improvements on said premises, in which defendant and family now reside; that defendant's improvements upon said lands made by him thereon, for the use of himself and family, and the improvements and betterments on said lands, have cost the defendant, and are of the value of seven thousand ($7,000.00) dollars; that by reason of defendant's occupancy, cultivation, and improvement of said lands, and the growth of the country surrounding the same, said lands have increased in value from about $1,600.00, at the time defendant made his settlement and claimed his homestead right thereon, to about the sum of one hundred thousand ($100,000.00) dollars, the present value thereof.

IX.

That the defendant, on or about the 29th day of April, 1892, went to the local land office at Olympia, Washington, he having at that time constantly resided upon said lands, claiming the same under the law as his homestead and his aforesaid offering and demand to make his aforesaid filing thereon, and having improved and cultivated the same for more than five years, as provided by the homestead laws of the United States, and demanded of the register and receiver of said local land office to issue the notice provided by law, fixing the time and place where the defendant should produce his witnesses to make his final proof under his said homestead claim,

which was refused by the officers of said local land office, for
44 the alleged reason that said lands were embraced in and covered by the aforesaid land grant.

X.

Defendant further charges and avers that on or about the 13th day of December, 1892, plaintiff procured to be issued to them, under said land grant, a patent, regular in form, dated and signed December 13th, 1892, purporting to convey said lands to plaintiff; that said patent was duly recorded January 18th, 1893, in the office of the county auditor of Pierce county, Washington, in Record of Deeds, vol. 99, at page 101, and this defendant avers that said patent was illegally and unlawfully issued, for the reason that the lands described therein, the same being the lands in controversy in this suit, *was* for the reasons hereinbefore pleaded excluded from the grant of July 2nd, 1864, aforesaid, and said patent void.

XI.

That this defendant is the head of a family, is over the age of 21 years, and in 1886 had and now has the lawful right to make his homestead entry as tendered and offered April 9th, 1886, under the homestead laws of the United States. That at said times said lands were unoccupied public lands of the United States, subject to homestead entry; that the defendant and his family made settlement upon the land aforesaid on April 9th, 1886, and have continued to live thereon continuously from said April 9th, 1886, to the present time; that said defendant and his said family went into possession of said lands lawfully and peaceably, and have remained in
45 undisturbed possession thereof until now; and this defendant alleges that he has the legal and the equitable right to the possession of said premises, and the right to make final proof under the homestead law, and procure to himself a patent from the United States to said premises.

The defendant having now fully answered, prays judgment and order of this court declaring said patent void, and canceling the same, and that plaintiff take nothing by this suit, and that this defendant is lawfully in possession of said premises, with judgment for his costs herein laid out and expended, and for such other and further order and judgment as the defendant may be entitled to herein.

BALLARD & NORRIS,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss.:
County of Pierce, }

I, James De Lacy, being first duly sworn, upon my oath state that I am the defendant named in the foregoing-entitled action; that I have read the foregoing amended answer, know and understand its contents, and said amended answer is true, as I verily believe.

JAMES DE LACEY.

Subscribed and sworn to before me this July 12th, 1893, at Tacoma, Washington.

[SEAL.] HOMER F. NORRIS,
Notary Public in and for said State of Washington;
Residence, Tacoma, Pierce County, Washington.

46 Received a copy of the foregoing amended answer this July 12th, 1893, at Tacoma, W'n.

F. M. DUDLEY,
ASHTON & CHAPMAM,
Attorneys for Plaintiff.

(Endorsement:) Filed July 12th, 1893. A. Reeves Ayres, clerk.

And afterwards, to wit, on the 16th day of August, 1893, there was duly filed in said court, in the cause, a demurrer to affirmative defense in amended answer, in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
v.
JAMES DE LACY, Defendant. } No. 193.

Demurrer to Amended Answer.

Comes now the plaintiff, Northern Pacific Railroad Company, by Ashton & Chapman, its attorneys, and demurs to the affirmative defense contained in the amended answer herein, and for
47 cause of demurrer says that said affirmative defense in said amended answer does not state facts sufficient to constitute a defense to this action.

ASHTON & CHAPMAN,
F. M. DUDLEY,
Attorneys for Plaintiff.

I, J. M. Ashton, one of the attorneys for the plaintiff in the above-entitled action, do hereby certify that in my opinion the above demurrer is well founded in point of law.

J. M. ASHTON, *Of Counsel.*

Filed August 16th, 1893.

A. REEVES AYRES, *Clerk.*

And afterwards, to wit, on Tuesday, the 6th day of February, 1894, the same being the first judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

48 In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
v.
JAMES DE LACY, Defendant.

Order Making Receivers Parties.

Be it remembered that on this 6th day of February, 1894, being one of the regular court days of said court, this cause coming on for hearing on the defendant's suggestion that plaintiff company is now under direction of the U. S. courts, and in the hands of Thos. F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers, and asking that said receivers be made parties to this action for the protection of all the interests of all parties to said suit;

It is now, therefore, ordered by this court that Thos. F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of plaintiff, be made parties defendants in above suit, and ordered to appear therein and to plead herein in 20 days from this date.

To which order and direction making said receivers party defendants the plaintiff, by counsel, objected, and excepts, which exception is noted by the court.

Filed Feb'y 6th, 1894.

A. REEVES AYRES, *Clerk.*

49 And afterwards, to wit, on Monday, the 12th day of February, 1894, the same being the 6th judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACY, Defendant.

Order Overruling Demurrer.

Be it remembered that on this February 12th, 1894, the same being one of the regular court days of said court, this cause coming on for hearing on plaintiff's demurrer to affirmative defense in the defendant's answer, plaintiff appeared by counsel, Ashton & Chapman, and the defendant by Ballard & Norris, attorneys, and after argument the court, being advised in the premises, overruled the said demurrer, to which ruling of the court the plaintiff at the time excepted, and exception allowed by the court.

C. H. HANFORD, *Judge.*

Filed Feb'y 12th, 1894.

A. REEVES AYRES, *Clerk.*

50 And afterwards, to wit, on the 27th day of February, 1894, there was duly filed in said court, in said cause, a reply, in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Rouse, and Henry C. Payne, as Receivers of the Northern Pacific Railroad Company, Plaintiff-,
vs.
JAMES DE LACY, Defendant.
} No. 193.

Reply to Amended Answer.

Comes now the plaintiff, Northern Pacific Railroad Company, and Thomas F. Oakes, Henry C. Rouse, and Henry C. Payne, as receivers of said Northern Pacific Railroad Company, having been made parties plaintiff to this action over the objection of plaintiff, and replying to the affirmative matter set up in defendant's amended answer herein, says:

1. That for a reply to the matters and things set forth in the first paragraph of said affirmative defense in said amended answer, the plaintiff, Northern Pacific Railroad Company, says that it
51 has no knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraph, and therefore denies the same, and each and every part thereof, except the allegation that on the 7th day of April, 1869, the land described in said paragraph was unoffered Government land, situated in Pierce county, Washington Territory, in the district of public lands subject to sale and entry at the United States land office at Olympia, Washington Territory, which is admitted.

2. For a reply to the allegations of the second paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same, and each and every part thereof, except that the defendant admits that said John Flett was not allowed to prove up on said land.

3. For a reply to the allegations of the third paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same and each and every part thereof, except the allegations in said third paragraph regarding the location of said land which is admitted.

4. For a reply to the allegations of the fourth paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to

the truth thereof, and therefor- denies the same and each and every part thereof, except the allegation in said fourth paragraph that said John Flett had forfeited all his rights, if any he had, to
52 make final proof as required by law, which allegation is admitted.

5. For a reply to the allegations of the sixth paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same and each and every part thereof, except the allegation in said paragraph that the map of general route of plaintiff's main line of railroad was filed on July 30th, 1870, and that an order of withdrawal was issued by the Land Department of the United States on August 13th, 1870, as provided in the grant to plaintiff as alleged in said paragraph which allegation said plaintiff admits.

6. Said plaintiff denies each and every allegation contained in the seventh paragraph of said affirmative defense in said amended answer, except the allegation that the lands referred to therein were embraced within the limits of the order of withdrawal of August 13, 1870, as alleged in said paragraph, which allegation is admitted.

7. For a reply to the allegations of the eight- paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same and each and every part thereof; but said plaintiff admits that the lands in controversy are within the limits of the grant to plaintiff on main line of plaintiff's railroad, as definitely located and fixed under and by virtue of the act of Congress of July 2nd, 1864, and the acts supple-
53 mental thereto and amendatory thereof, and said plaintiff further admits that the defendant is in possession of said lands.

8. For a reply to the allegations of the ninth paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to the truth thereof and therefore said plaintiff denies the same and each and every part thereof.

9. For a reply to the allegations of the tenth paragraph of said affirmative defense in said amended answer, said plaintiff says that it admits that a patent for said lands was duly issued to the plaintiff and that the same has been recorded, as alleged in said tenth paragraph, and said plaintiff denies each and every other allegation in said tenth paragraph.

10. For a reply to the allegations of the eleventh paragraph of said affirmative defense in said amended answer, said plaintiff says that it denies that on the 9th day of April, 1886, said lands were unoccupied public lands of the United States, subject to entry, and as to all the other allegations contained in the eleventh paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same and each and every part thereof, except the further allegation in said

eleventh paragraph that defendant is now in possession of said premises, which allegation is admitted by said plaintiff.

ASHTON & CHAPMAN,
F. M. DUDLEY,
Attorneys for Plaintiff.

54 STATE OF WASHINGTON, } ss:
County of Pierce, }

Paul Schultze, being first duly sworn, on oath deposes and says that he is the general land agent of The Northern Pacific Railroad Company, the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof, and that he believes the same to be true.

PAUL SCHULZE.

Subscribed and sworn to before me this 26th day of February, 1894.

W. O. CHAPMAN,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

(Endorsement:) Due service of within reply, by receipt of a true copy thereof, admitted this 26th day of February, 1894. Ballard & Norris, attorneys for defendant.

Filed 27th ——, 1894.

A. REEVES AYRES, *Clerk.*

And afterwards, to wit, on the 18th day of July, 1894, there was duly filed in said court, in said cause, a stipulation in the words and figures as follows, to wit:

55 In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff, } No. —.
vs.
JAMES DE LACEY, Defendant. }

Stipulation Waiving Jury.

Now, on this 18th day of July, 1894, the above-entitled action coming on regularly for trial, it is stipulated and agreed by and between the parties hereto, through their respective attornevs, in open court, that said action may be tried by the court without the intervention of a jury.

Dated this 18th day of July, 1894.

F. M. DUDLEY AND
ASHTON & CHAPMAN,
Attorneys for Plaintiff.
BALLARD & NORRIS,
Attorneys for Defendant.

Due service of within stipulation by receipt of a copy thereof admitted this 19th day of July, 1894.

BALLARD & NORRIS,
Attorneys for Defendant.

(Endorsed:) Filed July 18, 1894. A. Reeves Ayres, clerk, by Sam'l D. Bridges, dep.

56 And afterwards, to wit, on Wednesday, the 18th day of July, 1894, the same being the 12th judicial day of the regular July term of said court—present, the Honorable William B. Gilbert, United States circuit judge, presiding—the following proceedings were had in said cause, to wit:

Order of Submission.

This cause coming on for trial, F. M. Dudley, Esq., and Ashton & Chapman appearing on behalf of the plaintiff, and Messrs. Ballard & Norris for the defendant, it was thereupon stipulated between the counsel, in open court, that trial by jury should be waived, and the cause duly proceeded before the court. The testimony and arguments of counsel having been heard, the cause was taken under advisement by the court.

And afterwards, to wit, on the 13th day of September, 1894, there was duly filed in said court, in said cause, an opinion, in the words and figures as follows, to wit:

57 In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACEY, Defendant.

Opinion.

Ashton & Chapman and Fred M. Dudley, for plaintiff; Ballard & Norris, for defendant.

GILBERT, *J.*:

The Northern Pacific Railroad Company brings ejectment to recover possession of 160 acres of land in section 21, township 20 north, range 3 east of the Willamette meridian, in the State of Washington.

The plaintiff claims title by virtue of the act of Congress of July 2, 1864, incorporating the Northern Pacific Railroad Company, and authorizing it to construct and maintain a railroad from a point on Lake Superior westerly, on a line north of the 45th degree of latitude, to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the State of Oregon, leaving the main line at the most suitable place not
58 more than three hundred miles from its western terminus; also the joint resolution of May 31st, 1870, authorizing the

company to construct its main road to some point on Puget sound via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound.

The defendant claims title and possession by virtue of a homestead entry made, or attempted to be made, by him on the 9th day of April, 1886, and he contends that the land in controversy was excepted both from the grant of July 2, 1864, and from the joint resolution of May 31, 1870, by reason of the pre-emption claim of John Flett. He alleges that John Flett filed a pre-emption declaratory statement upon this land on the 9th day of April, 1869, and occupied the same under said declaratory statement until 1871, and further states that "Flett not having resided on the land since 1871, forfeited all his right to make final proof," but that the pre-emption declaratory statement so entered in the land office by Flett remained of record therein, and was not canceled until 1891. It is the contention of the defendant that this declaratory statement of Flett, remaining of record at the time the lands granted to aid the construction of the Northern Pacific were withdrawn from settlement when the map of the general route was filed, and at the time the map of definite location was filed, operated to except the land from the grant to the Northern Pacific, under the words of the granting act as the same have been construed by the courts.

59 The land in controversy lies within the primary limits of the land grant, both of the main line of the railroad as definitely located between Portland and Puget sound, and the line of the Cascades branch as definitely located between the point where it leaves the main line and cross- the Cascade mountains to Puget sound. It has been held that the grant of lands to aid the construction of that portion of the main line between Portland and Puget sound dates from the joint resolution of May 31, 1870, and that prior to that time there was no land grant whatever in aid of the construction of that portion of the road (United States *v.* Northern Pacific Railroad Company, 152 U. S., 284), and if the title in controversy in this suit were to be determined by the rights which the railroad company acquired under the joint resolution only, the decision must be for the defendant, for it is clear that at and prior to the date of the joint resolution there was upon file in the land office a valid and subsisting pre-emption entry upon the land in controversy, which entry, being unforfeited and uncanceled, operated to except the land from the grant.

Kansas Pacific Railway *v.* Dunmeyer, 113 U. S., 629.
Bardon *v.* Northern Pacific Railroad, 145 U. S., 535.
Sioux City Land Co. *v.* Griffey, 143 U. S., 32.

But the land is, as already shown, also within the primary limits of the grant to aid the construction of the Cascades branch, and it remains to be considered how the rights of the respective parties are affected by that fact. The grant of July 2, 1864, gave land

60 in aid of the construction of a railroad across the Cascade mountains to Puget sound. That grant was not intended to

be abrogated by the joint resolution of May 31, 1870, and there is nothing in the opinion of the Supreme Court in United States *v.* Northern Pacific Railroad Company, *supra*, to the contrary. That decision goes no further than to hold that in the act of 1864 there was no land grant to aid the construction of a line between Portland and Puget sound, and nothing to show that it was the intention of Congress to connect those two points by a railroad. It must be held, therefore, that the grants to aid the construction of a line by way of the Columbia river valley to Portland, and a line across the Cascade mountains to Puget sound, took effect upon July 2, 1864, and that the joint resolution of May 31, 1870, while designating the Columbia River line as the main line, which had before been called the branch line, and naming the line across the Cascade mountains to Puget sound the branch line, which had before been the main line, did not, and was not intended to, revoke or cancel the grants in aid of those respective lines but recognized the grants as existing and remaining in force. The lands in aid of the line across the Cascade mountains to Puget sound were granted in 1864. The land in controversy in this suit was public land at that time, and it passed to the railroad company by the grant, if at the date of the definite location, to wit, on May 26, 1884, the United States had full title, or the same were not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights.

It is contended that the Flett pre-emption entry in the
61 land office constituted a pre-emption claim, which operated to bring the land within the exception contained in the grant, and that therefore the railroad company has no title upon which to recover. If there were no information before the court concerning the pre-emption claim other than the entry in the land office, a different case would be presented; but the defendant alleges in his answer an abandonment of this land by Flett in 1871, and a forfeiture of all his rights under the pre-emption entry. He produces before us also the record of a contest before the register and receiver of the local land office of the district in which this land is situated, which contest was carried by appeal to the Secretary of the Interior, and by him decided on the 28th day of November, 1891. From the record so offered, it appears that the plaintiff and defendant in this case and John Flett were parties, and appeared and presented the evidence of their respective rights. In that contest, as appears from the record, the evidence concerning Flett's pre emption settlement was fully submitted, and it was shown that in 1870 Flett had offered to prove up upon his claim before the officers of the local land office, and had been informed by them that the land was railroad land and was not subject to his entry; that he made no appeal from that decision, and in consequence thereof abandoned his claim, and in 1874 made homestead entry on other lands. In consequence of the conclusion so reached by the Secretary of the Interior a patent was issued from the Government to the railroad company for the land on December 13, 1892.

62 There are two periods to be regarded in determining whether the lands passed to the railroad company under its

grant—the date of the grant and the date of the definite location of the road. If at either of these dates a claim attached such as is mentioned in the exceptions to the granting act, the land which was subject to such claim was excluded; but if such a claim attached at a time intermediate between those dates, and was extinguished before the latter date, it would have no discernible effect upon the status of the title (Amacker *v.* N. P. R. R. C., 7 C. C. A., 518), and this irrespective of whether or not the claim was in existence at the time of filing the map of general route, so as to exclude the land from the consequent withdrawal in favor of the railroad company. The fact that this land was not among the lands so withdrawn from sale or settlement has no bearing upon the questions involved. The withdrawal was a provision for the protection of the grant, but it was not a step in the acquirement of the railroad company's title. Its title to lands under the grant did not depend upon the withdrawal.

The material fact in this case is, that at the time the line was definitely located the claim of Flett no longer attached, but had been extinguished. It is immaterial whether it was extinguished by a proceeding in the land office resulting in a cancellation of the entry, or by the voluntary action of the claimant, amending his entry and releasing the lands as in the Amacker case, or by the abandonment and forfeiture of the claim as in the case now
63 under consideration. The defendant relies upon the fact that the Flett entry remained uncanceled until 1891. A declaratory pre-emption statement on file prior to and at the time the grant was made would be proof of the intention of Congress to exclude from the grant the land covered thereby; and such an entry in the files of the land office, made after the date of the grant and remaining in existence at the time of the definite location, so as to furnish evidence of a claim that might ripen into a title by compliance with the land laws, would likewise serve to exclude the land from the grant; for it was not the intention of the grant, as construed by the decisions, to permit an inquiry into the *bona fides* of such a claim or the performance of the conditions which rested upon the claimant. But here it is not only admitted by both the parties to the action that Flett abandoned and forfeited his claim in 1871, but the very right of the defendant to possess and claim the land is predicated upon such abandonment by Flett and the extinction of Flett's claim. Such an admission must be held to destroy the effect and force of the entry in the land office. The court will not regard the existence of an entry the life of which is admitted to have expired, but must be guided by the admitted fact.

It must be held, therefore, that the land in controversy was public land, subject to the grant in 1864, and free from any claim that would exempt it therefrom in 1884, when the line of the road was definitely located, a-d the plaintiff is therefore entitled to judgment.

W. B. GILBERT, *Judge.*

64 (Endorsed:) Filed September 13, 1894. A. Reeves Ayres, clerk, by Sam'l D. Bridges, deputy clerk.

And afterwards, to wit, on the 15th day of September, 1894, there was duly filed in said court, in said cause, a motion for new trial, in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Rouse, and Henry C. Payne, as Receivers of the Northern Pacific Railroad Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.
No. 193.

Motion for New Trial.

Comes now the defendant, James De Lacey, and moves the court to set aside the findings of fact, conclusions of law, and the judgment entered in the above-entitled cause as found and rendered and filed in said cause, Sept. 13, 1894, for the following causes, to wit:

1st. For error of the court in sustaining the motion of plain-
65 tiffs to strike out the 3rd paragraph of defendant's original answer, alleging the attempted settlement and attempted homestead filing of John Alger upon the premises in dispute, and subsequent appeal and pending of said claim and appeal from July 10th, 1883, until November 28, 1891, as being immaterial.

2nd. For error of the trial court in permitting the plaintiffs to introduce as evidence the patent from the United States to plaintiff, Northern Pacific Railroad Company, for the land in dispute, for the reason (Ex. "A," schedule and record) that the same is incompetent, immaterial, and not tending to prove any issue made in the pleadings.

3rd. For error of the trial court in permitting plaintiffs to introduce as evidence Exhibit "B" of plaintiffs' rebutting evidence, being a certified copy of the map of general route of branch line, filed August 20, 1873, for the reason the same is incompetent and immaterial, and not tending to prove any issue made in the pleadings.

4th. For error of the trial court in permitting plaintiffs to introduce as evidence Exhibit "C" of plaintiffs' rebutting evidence, being certified copy of map of amended line of general route, filed June 11, 1879, for the reason the same is immaterial, incompetent, and not tending to prove any issue made in the pleadings.

5th. For error of the trial court in permitting plaintiff- to introduce as evidence Plaintiffs' Exhibit "D," being in rebuttal to defendant's evidence, and set out in plaintiffs' schedule of evidence and record, for each of the items therein, to wit, 1, 2, 3, 4, and 5,

for the reason that the same are immaterial, incompetent, and not tending to prove any issue made in the pleadings.

66 6th. The court erred in permitting plaintiffs, in rebuttal, to introduce the letters and endorsements set out in plaintiffs' schedule, Exhibit- "D" to "F," submitted by plaintiffs and shown by the record, for the reason that the same is immaterial, incompetent, and as not tending to prove any issue made in the pleadings.

7th. The court erred in permitting plaintiffs, in rebuttal, to introduce as evidence any and all the documentary evidence and maps as shown on the schedule of plaintiffs' testimony served and furnished the court, and as shown by the record in said cause, for the reason that all and each of said documents offered and received by the court are immaterial and irrelevant, and not tending to prove any issue made in the pleadings; to the introduction of which defendant at the time objected. Same overruled, and exceptions allowed by the court.

8th. The court erred in finding that the land in controversy was excluded from the grant on the main line of said railroad from Portland to the Puget sound, and holding that the same was embraced in the map as amended by route over the branch line under map filed in 1884; and in holding that by reason of Flett's abandonment of D. S., 1227, the land reverted to the public domain, and that the grant of 1864 attached thereto and said land, covered thereby.

9th. The court erred generally in finding from the pleadings and evidence in favor of the plaintiffs, and against the defendant on the issues made in the pleadings; and erred in rendering judgment in said cause against the defendant and in favor of the plaintiffs.

67 This motion is made and submitted upon the records of the trial, minutes of the court, the evidence offered by plaintiffs and objected to by the defendant, as shown by the schedule filed, and the records kept during the trial, and upon all the evidence in the case, and all rulings and exceptions taken, and upon the pleadings and proceedings on file in the clerk's office, and upon each of them, as well as upon the whole record in the case.

And asks that on rehearing the court sustain this motion and set aside said judgment in favor of plaintiffs, and for such judgment as should under the evidence and law be entered in favor of defendant.

Dated Sept. 15, 1894.

BALLARD & NORRIS,
Attorneys for Defendant.

Received copy of the foregoing motion this 15th day of September, 1894, at Tacoma, W'n.

ASHTON & CHAPMAN,
Attorneys for Plaintiff.

(Endorsed:) Filed September 15, 1894. A. Reeves Ayres, clerk, by Sam'l D. Bridges, deputy.

And afterwards, to wit, on the 6th day of October, 1894, there was duly filed in said court, in said cause, a findings of fact, in the words and figures as follows, to wit:

68 In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACEY, Defendant.

Findings of Fact and Conclusions of Law.

Be it remembered, that this cause coming on regularly for trial on the 18th day of July, 1894, before the court, sitting without a jury (a trial by jury having been waived by a stipulation in writing signed and filed in court by the attorneys of the parties plaintiff and defendant herein before the trial commenced, and evidence having been introduced and the cause having been argued by counsel for both plaintiff and defendant), the same was, by the court, taken under advisement, and now, on this — day of September, A. D. 1894, the court hereby makes and files the following special findings of fact:

Findings of Fact.

That by an act approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph
69 line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," the Congress of the United States authorized and empowered the plaintiff to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be adopted by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place not more than three hundred miles from its western terminus. And to aid in the construction of said railroad and telegraph line there was granted to said railroad company every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company might adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passed through any State, and whenever on the line thereof the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said railroads should be definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.

70 II.

By a joint resolution approved May 31, 1870, entitled "A resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its railroad, and to secure the same by mortgage, and for other purposes," the said United States authorized the said plaintiff to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound.

III.

March 6, 1865, Josiah Perham, president of the Northern Pacific Railroad Company, transmitted to the Secretary of the Interior a map of the general line of said railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget sound, in Washington Territory, together with the following letter:

"WASHINGTON, D. C., *March* 6, 1865.

SIR: Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map, in red ink, the general line of their road from a point on Lake Superior, in the State of Wisconsin, to a point on Puget sound, in Washington Territory, via the valley of the Columbia river, adopted by said company as the line of said railroad subject only to
71 such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company may be marked and withdrawn from sale in conformity to law.

I am, respectfully, your obedient servant,

JOSIAH PERHAM,
President Northern Pacific Railroad Company.

Hon. J. P. Usher, Secretary of the Interior.

The line in the Territory (now State) of Washington, as shown on said map, entered the State west of Lake Pend d'Oreill, thence ran in a southwesterly direction to the junction of the Snake and Columbia rivers. At this point there was a branch, and one line ran in a northwesterly direction to the Yakima river and across the mountains to a point on Puget sound, near where the city of Tacoma now is. The other branch extended south and west down the valley of the Columbia river to a point opposite the mouth of the Willamette river, thence in a northerly direction to Puget sound, where it joined the line crossing the Cascade mountains. The land in controversy is on and within forty miles of this line.

IV.

July 30, 1870, a map of the main line of said Northern Pacific railroad, showing the general route thereof, was filed in the office of the Secretary of the Interior, and was transmitted by that
72 officer to, and filed in, the office of the Commissioner of the General Land Office, August 13, 1870. The land in controversy is on and within forty miles of this line of general route.

V.

May 14, 1874, the said railroad company filed with the Secretary of the Interior, and that officer transmitted to the Commissioner of the General Land Office for filing, a map showing the definite location of that portion of the line of said Northern Pacific railroad, extending from Tacoma southerly to Tenino, and on said day the Commissioner of the General Land Office, in accordance with the instructions of the Secretary of the Interior, duly filed the said map. The land in controversy is within the forty-mile limits of the grant to said company as defined by this map.

VI.

The plaintiff duly constructed the main line of its road over the line designated on said map, and opposite the land in controversy, and that portion of said line having been examined by commissioners appointed by the President of the United States for that purpose, was by them reported to be constructed in a good, substantial, and workmanlike manner, as required by the act of Congress, and the President of the United States, upon receipt of said report, to wit, on the — day of ——, —, approved the same and accepted said road.

VII.

August 20, 1873, the plaintiff filed in the office of the Com-
73 missioner of the General Land Office a map showing the general route of its branch line of railroad extending from a point on said main line, in northern Idaho, thence in a general westerly direction across the Cascade mountains to Puget sound. The land in controversy did not fall within forty miles of this line of general route.

VIII.

After the filing of said map of general route in 1873, the said railroad company applied to the Secretary of the Interior for permission to amend said line of general route, and after much correspondence, and it appearing that the interests of both the United States and the railroad company would be materially benefited by such amendment, the line of the branch being thereby greatly shortened and much more practicable and eligible route thereby adopted, the Secretary of the Interior authorized such amendment, and thereafter, to wit, May 10, 1879, the said railroad company

transmitted to the Secretary of the Interior a map showing such relocated line of general route. June 11, 1879, such map was, by the Secretary of the Interior, transmitted to the Commissioner of the General Land Office for filing, with instructions that the same be filed, and that the lands cotermin-us therewith be withdrawn from sale, pre-emption, or entry for the benefit of said railroad company, and on said day said map was duly filed in the office of the Commissioner of the General Land Office. There was filed with said map a relinquishment, made by the said railroad company in consideration of the permission to relocate such line of general route, of all lands on and within forty miles of the line of
74 general route filed in 1873, which were not also within forty miles of the relocated line. The land in controversy is on and within forty miles of the relocated line of general route.

IX.

July 3, 1879, the Commissioner of the General Land Office directed the register and receiver of the United States district land office at Olympia, Washington, within which district the land in controversy is situate, to withhold from sale or entry the public lands within 40 miles of and cotermin-us with such relocated line of general route. This order was received and filed in the office of the register and receiver during the same month.

X.

Thereafter the said railroad company surveyed and definitely located the line of its branch road extending from Tacoma to South Prairie, and March 26, 1884, filed a map showing such line of definite location in the office of the Commissioner of the General Land Office. The land in controversy is within the limits of the grant for the branch line, as defined by this map of definite location.

XI.

The said railroad company duly constructed twenty-five miles of the line of the branch road from the terminus in the city of Tacoma to a point near South Prarie, and the same having been examined by commissioners appointed for that purpose by the President of the United States, was by said commissioners, April 23, 1884, reported to have been constructed in a good, substantial, and
75 workmanlike manner, as required by the said act of Congress, October 1, 1884, this report was transmitted by the Secretary of the Interior to the President of the United States, with the recommendation that this portion of the road be accepted, and October 7, 1884, it was by the President so accepted.

XII.

April 9, 1869, one John Flett filed declaratory statement No. 1227, declaring his intention to purchase the east half of the southwest quarter (E. ½ of S. W. ¼), the southeast quarter of the northwest quarter (S. E. ¼ N. W. ¼), and the southwest quarter of the north-

east quarter (S. W. ¼ of N. E. ¼) of section twenty-one (21), township twenty (20) north, of range three (3) east, under the laws of the United States authorizing the pre-emption of unoffered lands. Whether or not Flett was at this time qualified to enter the land under the pre-emption or homestead laws does not appear.

XIII.

In the fall of 1869 Flett left the land in controversy, and did not thereafter reside thereon, although it is recited in the decision of the Secretary of the Interior in a contest between the railroad company, De Lacey, Flett, *et al.*, before the Interior Department, involving the land here in controversy, that in September, 1870, Flett went to the local land office and told the officers that he had come to prove up on his claim; that they told him it was railroad land, and that he had lost it; that Flett did not then actually offer to
76 make proof, but acquiesced in the advice of the local officers that he was not entitled to submit proof under his filing.

XV.

The defendant, James De Lacey, settled upon the land in controversy in April, 1886. April 5, 1886, he applied to make homestead entry thereon. His application was rejected for the reason that the land fell within the limits of the grant to the railroad company on both main and branch lines. From this decision by the register and receiver De Lacey appealed to the Commissioner of the General Land Office.

XVI.

September 7, 1887, John Flett submitted proof in support of his pre-emption claim, founded upon his declaratory statement filed April 9, 1869.

XVII.

Afterward, under the instructions of the Commissioner, a hearing was had, at which all the parties, the railroad company, James De Lacey, John Algyr, and John Flett were present. July 27, 1889, the receiver of the district land office found that Flett had not voluntarily abandoned the land in 1869, and that his entry should be reinstated. From this finding all the parties but Flett appealed to the Commissioner of the General Land Office, and December 5, 1889, the Commissioner sustained the finding of the receiver. Thereafter the other parties to the contest appealed to the Secretary of the Interior. September 28, 1891, the Secretary of the Interior re-
77 versed the ruling of the Commissioner of the General Land Office, and awarded the land in controversy to the railroad company.

December 13, 1892, letters patent of the United States, regular in form, were issued, conveying the land in controversy to the plaintiff.

XIX.

Flett's declaratory statement was not formally canceled upon the records until Dec. 23, 1891.

XX.

The defendant is in possession of the land and withholds such possession from the plaintiff.

XXI.

The value of the land in controversy is over $100,000.00.

Conclusions of Law.

First. That the said plaintiff, under and by virtue of said act of Congress approved July 2, 1864, and the joint resolution of May 31, 1870, and by its compliance with the terms thereof, obtained the legal title to the public lands of the United States on and within 40 miles of the line of its road in Washington, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time of the grant and of the definite location of the line of said road opposite thereto.

Second. That the grant to said Northern Pacific Railroad Company coterminous with the line across the Cascade mountains was made by, and takes effect from, the act of July 2, 1864.

78 Third. That the grant coterminous with the main line from Tacoma to Portland, as against all prior claims or rights, was made by, and takes effect from, the date of the joint resolution of May 31, 1870.

Fourth. That at the date of the grant to said Northern Pacific Railroad Company, July 2, 1864, the land in controversy was public land of the United States, not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights.

Fifth. That prior to June 11, 1879, and from and after the abandonment of the land by John Flett, the said land was public land of the United States, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights.

Sixth. That the land in controversy was, from and after June 11, 1879, reserved from sale, pre-emption, or entry, except by said railroad company, by virtue of fixing the line of general route of the branch line coterminous therewith.

Seventh. That the Commissioner of the General Land Office, acting under the Secretary of the Interior was authorized to reserve from sale, location, homestead, or pre-emption entry the odd-numbered sections of public land coterminous with the said line of general route as shown by the map filed in 1879.

Eighth. That from and after the receipt of the order of withdrawal at the United States district land office, to wit, July 19, 1879, the land in controversy was reserved from sale or entry for the benefit of said railroad company, by virtue of said order.

79 Ninth. That at the time John Algyr applied to file declaratory statement for the land in controversy said land was reserved for the benefit of the plaintiff, and was not subject to the operation of the pre-emption or homestead laws.

Tenth. That upon the definite location of said branch line, March 26, 1884, and the subsequent construction of the branch line thereover, the said plaintiff acquired the fee-title to the land in controversy, and became and was entitled to the possession thereof.

Eleventh. That the patent issued by the United States to the plaintiff was rightfully issued.

Twelfth. That the defendant wrongfully and unlawfully withholds possession of said land from said plaintiff.

W. B. GILBERT, *Judge.*

(Endorsed:) Filed October 6th, 1894. A. Reeves Ayres, clerk. Sam'l D. Bridges, deputy.

And afterwards, to wit, on the 9th day of October, 1894, there was duly filed in said court, in said cause, a motion for new trial, in the words and figures as follows, to wit:

80 In the Circuit Court of the United States for the District of Washington, Western Division.

THE NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. OAKES, HENRY C. ROUSE, and HENRY C. PAYNE, as Receivers of the Northern Pacific Railroad Company, Plaintiffs,

vs.

JAMES DE LACEY, Defendant.

No. 193.

Motion for New Trial.

Comes now the defendant, James De Lacey, and moves the court to set aside the findings of fact, conclusions of law, and the judgment entered in the above-entitled cause as found and rendered, and filed in said cause October 6th, 1894, for the following causes, to wit:

1st. For error of the court in sustaining the motion of plaintiffs to strike out the 3rd paragraph of defendant's original answer alleging the attempted settlement and attempted homestead filing of John Algyr upon the premises in dispute and subsequent appeal, and pending of said claim and appeal from July 10th, 1883, until November 28, 1891, as being immaterial.

2nd. For error of the trial court in permitting the plaintiffs to introduce in evidence the patent from the United States to
81 the plaintiff, The Northern Pacific Railroad Company, for the land in dispute, for the reason (Ex. "A," schedule and record) that the same is incompetent, immaterial, and as not tending to prove any issue in this cause.

3rd. For error of the trial court in permitting the plaintiffs to introduce as evidence Exhibit "B" of plaintiffs' rebutting evidence,

for the reason that the same is immaterial, the map of general route having been previously fixed and admitted in the pleadings.

4th. For error of the trial court in permitting plaintiffs to introduce as evidence Plaintiffs' Exhibit- "C," "D," "E," and "F," with the items therein contained and numbered as shown by plaintiffs' schedule of evidence, and the record in this case, for the reason that the same, and each of them, are immaterial and incompetent.

6th. The court erred in permitting plaintiffs in rebuttal to introduce the letters and endorsements set out in plaintiffs' schedule Exhibits "D" to "F," inclusive, and as shown by the record, for the reason that the same is incompetent and immaterial.

7th. The court erred in permitting the plaintiffs in rebuttal to introduce all or any part of the documentary evidence, and maps, as shown on the schedule of plaintiffs' testimony, served and furnished the court, as shown by the record in said cause, for the reason that each and all of the said documents offered and received by the court were and are immaterial and irrelevant, and not tending to prove any issue made in the pleadings.

82 8th. The court erred in his findings of fact, numbered from one (1) to seventeen (17), inclusive, said facts so found being in conflict with the facts as found by the Commissioner of the General Land Office upon the evidence submitted in the matter of contest between said pre-emptor Flett, the plaintiffs Northern Pacific Railroad Company, James De Lacey and John Algyr.

9th. The court erred in finding that the land in controversy was excluded from the grant on the main line of said Northern Pacific railroad from Portland to Puget sound, and then holding that the same was embraced in the map as amended by the route over the branch line, filed in 1884. And in holding that by reason of Flett's alleged abandonment of his declaratory statement No. 1227, the land reverted to the public domain, and that the grant of 1864 of the branch line attached thereto, and covered said land in controversy.

10th. The court erred in holding the land excluded from the grant on the main line under the act of Congress of 1870, and then holding said land as covered by the grant of 1864, under the amended map of 1884.

11th. The court erred in holding that by reason of the defendant's allegation to make proof in 1871, the lands reverted to the public domains, and became subject to prior or subsequent grants in the face of the proof from the records that this land had been pre-empted by said Flett as alleged, and that the same was undetermined and uncanceled until November 28, 1890, when for the first time under the rules of the Land Department said land reverted to the public domain.

83 12th. The court erred in finding that the land in controversy was covered by and passed to the plaintiffs under the grant of 1864, when the proof shows that said lands were within the grant of July 1st, 1870, on the main line of said road from Portland, Oregon, to Tacoma, Wash., on Puget sound, and covered by the order of withdrawal of August 13, 1870, and which facts are shown

by the patent as offered in evidence by the plaintiffs, and the alleged facts in defendant's amended answer, and sustained by the proof, shows that Flett's pre-emption D. S., No. 1227, was prior to said act, and excluded said land from the grant.

13th. The court erred generally in finding from the pleadings and evidence in favor of the plaintiffs and against the defendant on the issues made in the pleadings and defendant's evidence offered in support thereof; and erred in rendering judgment in said cause against the defendant and in favor of said plaintiffs.

This motion is made and submitted upon the records of the trial, minutes of the court, the evidence offered by plaintiffs and objected to by the defendant, as shown by the schedule filed, and the records kept during the trial, and upon all the evidence in the case, and all rulings and exceptions taken, and upon the pleadings and proceedings on file in the clerk's office of said court in said cause, and upon each of them, as well as upon the whole record of the said cause.

And asks that on rehearing, the court sustains this motion,
84 and set aside said judgment in favor of plaintiff, and for such judgment as should under the evidence and law be entered in favor of the defendant.

Dated October 9th, 1894, at Tacoma, W'n.

BALLARD & NORRIS,
Attorneys for Defendant.

Received copy of the foregoing motion this 9th day of Oct., A. D. 1894, at Tacoma, W'n.

F. M. DUDLEY, AND
ASHTON & CHAPMAN,
Attorneys for Plaintiffs.

Filed October 9, 1894.

A. REEVES AYRES, *Clerk*,
By SAM'L D. BRIDGES, *Deputy*.

And afterwards, to wit, on Wednesday, the 28th day of November, 1894, the same being the 32nd judicial day of the regular July term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, and the Honorable William B. Gilbert, United States circuit judge, presiding—the following proceedings were had in said cause, to wit:

Order Denying Motion for New Trial.

Now, on this day this cause coming on for hearing on motion of defendant for a new trial, and the court, after hearing the argument of counsel and being fully advised in the premises,
85 Orders that said motion be, and the same hereby is, denied, to which ruling of the court defendant excepts, and his exception is allowed.

And afterwards, to wit, on Wednesday, the 26th day of December, 1894, the same being the 35th judicial day of regular July term of said court—present, the Honorable William B. Gilbert, United

States circuit judge, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACEY, Defendant. } No. 193.

Judgment.

And now, to wit, on this 28th day of November, 1894, the defendant's motion for a new trial herein came on to be heard in open court, the plaintiff being present by its attorneys, Messrs. Ashton and Chapman, and the defendant by his attorneys, Messrs. Ballard & Norris.

86 And the court after having heard argument upon said motion for a new trial herein, and being duly advised in the premises, overrules the same, to which ruling of the court the defendant excepts and his exception is allowed, and the defendant gives notice in open court of an appeal of this case to the United States circuit court of appeals for the ninth judicial circuit.

It is, therefore, ordered and adjudged by the court that the plaintiff, Northern Pacific Railroad Company, do have and recover of and from the defendant James De Lacey the possession of the real property described in the complaint, to wit, the southwest quarter of the northeast quarter (S. W. 4 of N. E. 4), the southeast quarter of the northwest quarter (S. E. 4 of the N. W. 4), and the east half of the southwest quarter (E. 2 of the S. W. 4), of section twenty-one (21) township twenty (20), north, range three (3) east of Willamette meridian, in Pierce county, Washington, and that said plaintiff have and recover from said defendant the costs of this action, amounting to $214.00.

It is further ordered and adjudged that a writ of restitution issue herein, restoring to plaintiff the possession of the above-described real property and premises within ten days from this date.

Dated Dec. 26th, 1894.

WM. B. GILBERT, *Judge.*

Due service of within by receipt of a true copy thereof admitted this 24th day of Dec., 1894.

BALLARD & NORRIS,
Attorneys for Def't.

Filed Dec. 26th, 1894.

A. REEVES AYRES, *Clerk.*

87 And afterwards, to wit, on the 18th day of May, 1895, there was duly filed in said court, in this cause, a notice of appeal, in the words and figures as follows, to wit:

In the United States Circuit Court, Ninth Circuit, Western Division of Washington.

THE NORTHERN PACIFIC RAILROAD COMPANY, a Corporation; Thomas F. Oakes, Henry C. Rouse, and Henry C. Payne, Receivers of said Northern Pacific Railroad Company, Plaintiff-,
vs.
JAMES DE LACEY, Defendant. } No. 193.

Notice of Appeal.

To the above-named plaintiff- in the above-entitled cause, No. 193, and Messrs. Ashton & Chapman and F. M. Dudley, attorneys for said plaintiff-:

You and each of you will take notice that the defendant in said above cause, James De Lacey, hereby appeals from the final judgment made and entered in the above cause, No. 193, on the 26th day of December, A. D. 1894, to the next United States circuit court of appeals for the ninth circuit, holding terms of said ninth circuit court of appeals of the United States at San Francisco, State of California.

88 Of which appeal you will take due notice.

Dated Tacoma, Washington, May 17th, 1895.

BALLARD & NORRIS,
Attorneys for Defendant, and
THOMAS CARROLL,
Of Counsel for Defendant.

Filed in the U. S. circuit court May 18, 1895.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dep.*

And afterwards, to wit, on Tuesday, the 25th day of February, 1896, the same being the 15th judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

Order for Entry of Mandate.

Now, on this day, in open court, it is ordered that the mandate from the circuit court of appeals for this circuit be filed and entered herein, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the dis-
[SEAL.] trict of Washington, western division, Greeting:

Whereas, lately in the circuit court of the United States for the district of Washington, western division, before you or some
89 of you, in a cause between The Northern Pacific Railroad Company, plaintiff, and James De Lacey, defendant, a judg-

ment was duly filed and entered in favor of said plaintiff, which said judgment is in words and figures following, to wit:

And now, to wit, on this 28th day of November, 1894, the defendant's motion for a new trial herein came on to be heard in open court, the plaintiff being present by its attorneys, Messrs. Ashton & Chapman, and the defendant by his attorneys, Messrs. Ballard & Norris.

And the court after having heard argument upon said motion for a new trial herein, and being duly advised in the premises, overrules the same, to which ruling of the court the defendant excepts and his exception is allowed, and the defendant gives notice in open court of an appeal of this case to the United States circuit court of appeals, for the ninth judicial circuit.

It is therefore ordered and adjudged by the court that the plaintiff, Northern Pacific Railroad Company, do have and recover of and from the defendant, James De Lacey, the possession of the real property described in the complaint, to wit, the sout-west quarter of the northeast quarter (S. W. 4 of N. E. 4), the southeast quarter of the northwest quarter (S. E. 4 of the N. W. 4), and the east half of the southwest quarter (E. 2 of the S. W. 4), of section twenty-one (21), township twenty (20) north, range three (3) east, of Willamette meridian, in Pierce county, Washington, and that said plaintiff have and recover from said defendant the costs of this action, amounting to $214.00.

It is further ordered and adjudged that a writ of restitution
90 issue herein restoring to plaintiff the possession of the above-described real property and premises within ten days from this date.

Dated Dec. 26th, 1894.

And whereas, by order of court filed in said circuit court on February 6, 1894, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of said Northern Pacific Railroad Company, were made parties defendant therein; and whereas the writ of error herein included said receivers, and the citation issued returnable to our said circuit court of appeals, was directed to them, as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals, for the ninth circuit, by virtue of a writ of error agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in a term of October, and in the year of our Lord one thousand eight hundred and ninety-five, the said cause came on to be heard before the said circuit court of appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is hereby, *reserved* and the cause is remanded for further proceedings not inconsistent with the views expressed in the opinion of this court.

(FEB. 3, 1896.)

You, therefore, are hereby commanded that such reversal and further proceedings be had in said cause, not inconsistent
91 with the opinion and judgment of this court, and as according to right and justice and the laws of the United States ought to be had, the said judgment of said circuit court notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 21st day of February, in the year of our Lord one thousand eight hundred and ninety-six.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Costs of plaintiff in error, —.
Filed February 25th, 1896.

A. REEVES AYRES, *Clerk.*

92 U. S. Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC R. R. Co.
vs.
JAMES DE LACEY. } No. 244.

Costs of Plaintiff in Error.

Paid clerk U. S. circuit court for transcript	$117.50
Paid U. S. marshal serving writ of error	8.24
Paid docketing cause and filing record	5.00
Paid entering 2 appearances	50
Paid entering one order	20
Paid filing 2 papers	50
Paid filing briefs	10.00
Paid drawing, filing, and recording judgment	1.65
Paid mandate $5, costs and copy .40	5.40
Paid printing record	236.90
Paid expressage on record 40c., att'y's docket fee $20	20.40
Taxed at	$406.59

F. D. MONCKTON, *Clerk.*

And afterwards, to wit, on 2nd day of April, 1896, there was duly filed in said court, in this cause, a motion for judgment, in the words and figures as follows, to wit:

93 In the Circuit Court of the United States in and for the Ninth Circuit, Western Division of Washington.

THE NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Rouse, and Thomas C. Payne, Receivers of said Northern Pac. R. Co., Plaintiffs,
vs.
JAMES DE LACEY, Defendant. } No. 193.

Motion for Judgment.

Now comes the defendant, James De Lacey, and shows to the honorable court that the above cause was commenced in this court, tried and judgment entered against defendant.

That the defendant appealed said cause to the circuit court of appeals of the 9th circuit, where the judgment of the trial court was reversed, and said court of appeals in its opinion filed, says: "Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion."

That on the 21st day of February, 1896, mandate issued, and by order of this court, on motion, said mandate was filed and entered of record in said cause March 11th, 1896.

Defendant now moves the court for final judgment upon
94 the facts found by the honorable trial judge, and the law as laid down in said opinion of the honorable circuit court of appeals, and for such other or further proceedings as may be necessary, that justice may be done the parties.

BALLARD & NORRIS,
Attorneys for Defendant, James De Lacey.

Filed in the U. S. circuit court, April 2, 1896.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dep.*

And afterwards, to wit, on the 28th day of May, 1896, there was duly filed in said court, in this cause, a notice of motion for judgment, in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

THE NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Rouse, and Thomas C. Payne, Receivers of said Northern Pac. R. Co., Plaintiffs,
vs.
JAMES DE LACEY, Defendant. } No. 193.

Notice of Motion for Judgment.

To the above-named plaintiffs and Messrs. Ashton & Chapman and F. M. Dudley, attorneys for said plaintiffs:

95 Notice is hereby given you that the mandate from the U. S. circuit court of appeals of the ninth circuit, holding terms

at San Francisco, California, was filed and entered in the above circuit court, at Tacoma, W'n.

And on April 2nd, 1896, the counsel for the defendant filed in said cause a formal motion for judgment; a copy of said motion marked Exhibit "A," and made part of this notice, is herewith served upon you.

And you are further notified that said motion will be called up, and asking for final judgment in said cause, on Monday the 4th day of May, 1896, according to said mandate, at which time said motion will be heard, or as soon thereafter as counsel can be heard by the court.

BALLARD & NORRIS,
Attorneys for Defendant.

Filed in the U. S. circuit court, May 28, 1896.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dept.*

And afterwards, to wit, on Thursday, the 28th day of May, 1896, the same being the 26th judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

96 In the Circuit Court of the United States for the District of Washington, Western Division.

THE NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, and Thomas F. Oakes, Henry C. Rouse, and Thomas C. Payne, Receivers of said Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.
} No. 193.

Judgment.

Be it remembered that on this 28th day of May, A. D. 1896, the same being one of the regular court days of said above court, Honorable Judge C. H. Hanford, sole judge and presiding:

This cause coming on for hearing on notice duly served, and defendant's motion for judgment in compliance with the findings and judgment of the United States circuit — of appeals in and for said ninth circuit, holding terms at the city of San Francisco, California, as shown by the opinion rendered in said cause on appeal, and the mandate of said court of appeals filed herein and entered on the 11th day of March, A. D. 1896, by order of this court.

97 And after due consideration thereof by the court, the facts in issue having all been found on the trial of said cause, and not controverted in said appeal, and in conformity with the law of the case set out in the opinion of said court of appeals—

It is now ordered and adjudged by this court, that the patent issued by the United States Government to the plaintiff company,

on which plaintiff's cause of action and title rests, issued December 13th, A. D. 1892. for the land in controversy, to wit, the southwest quarter (S. W. ¼) of the northeast quarter (N. E. ¼), the southeast quarter of the northwest quarter (S. E. of N. W.), and the east half (E. ½) of the southwest quarter (S. W. ¼), section twenty-one (21), township twenty (20), north of range three (3) east of the Willamette meridian, in Pierce county, State of Washington, was issued without authority of law, and is therefore, void.

It is now, therefore, ordered and adjudged, by the court, that the above plaintiffs have no cause of action, and this cause is dismissed at the cost of plaintiffs.

And it is further ordered and adjudged by the court that the defendant herein have and recover of and from the plaintiffs herein his costs and legal disbursements in the sum of $—.

By order of the court.

C. H. HANFORD, *Judge.*

(Endorsement:) Filed in the U. S. circuit court, May 28, 1896. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

98 And afterwards, to wit, on Wednesday, the 17th day of June, 1896, the Honorable Cornelius H. Hanford, United States district judge, at chambers, the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of said Northern Pacific Railroad Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.
} No. 193.

Order Extending Time within Which to File Bill of Exceptions.

And now, to wit, on this 17th day of June, 1896, and within the time allowed plaintiffs for filing their bill of exceptions herein, upon plaintiffs' motion that they be given an extension of fifteen (15) days from this date within which to prepare and file their bill of exceptions, it is ordered and directed that plaintiffs be, and the same are hereby allowed fifteen (15) days additional time from
99 this date within which to prepare and file their bill of exceptions herein.

Done at chambers, this 17th day of June, 1896.

C. H. HANFORD, *Judge.*

Filed in the U. S. circuit court, June 17, 1896.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dep.*

And afterwards, to wit, on the 2nd day of July, 1896, there was duly filed in said court, in this cause, a bill of exceptions, in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

THE NORTHERN PACIFIC RAILROAD COMPANY, a Corporation; Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.

Bill of Exceptions.

Be it remembered, that on the 28th day of May, in the year of our Lord 1896, at a stated term of the said court begun and
100 holden in Tacoma, in and for the district of Washington, western division, before his honor, C. H. Hanford, district judge, the above case came on for hearing upon the motion of said defendant for judgment, which said motion is in the words and figures following, to wit:

"In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Rouse, and Thomas C. Payne, Receivers of said Northern Pacific Railroad Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.
No. 193.

Now comes the defendant James De Lacey, and shows to the honorable court that the above cause was commenced in this court, tried, and judgment entered against defendant. That the defendant appealed said cause to the circuit court of appeals of the 9th circuit, where the judgment of the trial court was reversed, and said court of appeals in its opinion filed, says: 'Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.'
101 That on the 21st day of February, 1896, mandate issued, and by order of this court, on motion, said mandate was filed and entered of record in said cause March 11th, 1896.

Defendant now moves the court for final judgment upon the facts found by the honorable trial judge, and the law as laid down in said opinion of the honorable circuit court of appeals, and for such other and further proceedings as may be necessary, that justice be done to the parties.

BALLARD & NORRIS,
Attorneys for Defendant, James De Lacey."

That said motion having been called up for hearing by the counsel for said defendant, the said plaintiffs thereupon, by their counsel, protested and objected to the allowance of said motion for the reasons following:

First. That said plaintiffs were, under the mandate of said United States circuit court of appeals, entitled to a new trial in said action for the purpose of showing the facts necessary to establish that the said Northern Pacific Railroad Company had good title in fee in and to the land described in the complaint.

Second. That the judgment, which was presented to the court for signature, together with said motion, was in part a decree in equity, in that it decreed that the patent issued to said Northern Pacific Railroad Company for the land described in the complaint herein, which said patent is dated December 13, 1892, is null and void.

That thereupon said court overruled said objections and granted said motion, to which action of said court the plaintiffs did
102 then and there except; and their said exception was then and there allowed and entered, and plaintiffs were allowed twenty days within which to file their bill of exceptions.

Forasmuch as the facts aforesaid, and the decision of the court thereon, do not appear of record, the plaintiffs pray that this, their bill of exceptions may be allowed.

Now, therefore, I, C. H. Hanford, judge of said court and trial judge in the above-entitled cause, do hereby certify that the foregoing bill of exceptions, from page 1 to page 4, inclusive, contains the rulings of the court upon said motion and defendant's exceptions thereto, which were allowed by the court.

And forasmuch as the said facts and matters and the rulings of the court thereon do not appear of record, and the defendant prays that his bill of exceptions may be allowed, the same is accordingly allowed and sealed.

Done at Seattle, Washington, this 2nd day of July, A. D. 1896.

C. H. HANFORD, *Judge.*

Received copy of the within bill of exceptions this 16th day June, 1896.

BALLARD & NORRIS,
Attorneys for Def'd't.

(Endorsement:) Filed in the U. S. circuit court July 2, 1896. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

103 And afterwards, to wit, on the 9th day of September, 1896, there was duly filed in said court, in this cause, an assignment of errors in the words and figures as follows, to wit:

United States Circuit Court for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY and THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.

Assignment of Errors.

Comes now the above-named plaintiffs, by their attorney, and say that in the records and proceedings in the above-entitled action in the said United States circuit court for the district of Washington, western division, there is manifest error as follows, to wit:

I.

The said court overruled plaintiff's demurrer to the affirmative defense in the defendant's answer herein.

104 II.

The said court refused to order a new trial, and entered judgment without the intervention of a jury, upon the defendant's motion.

III.

That the said judgment grants to the defendant equitable relief in that it decrees that the patent issued to the said Northern Pacific Railroad Company for the land described in the complaint herein, which said patent is dated December 13, 1892, is null and void.

IV.

The court failed and refused to hold that the patent of the United States issued to the plaintiffs December 13, 1892, conveyed to said plaintiffs the legal title to the land in controversy, and that plaintiffs are entitled to recover in this action.

V.

That said court entered a judgment not sustained by the findings of fact.

VI.

The said court failed and declined to hold that said Northern Pacific Railroad Company is the owner of, and that plaintiffs are entitled to the possession of, the land in controversy.

105 Wherefore, said plaintiffs pray that the said judgment of the said United States circuit court for the district of Washington, western division, be reversed.

ASHTON & CHAPMAN,
F. M. DUDLEY,
Attorneys for Plaintiffs.

Filed in the U. S. circuit court Sept. 9, 1896.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dep.*

And afterwards, to wit, on the 9th day of September, 1896, there was duly filed in said court, in this cause, a petition for writ of error, in the words and figures as follows, to wit:

106 United States Circuit Court for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY and THOMAS F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.

Petition for Writ of Error.

To the honorable judges of the United States circuit court of appeals for the ninth circuit:

Comes now the above-named plaintiffs, by their attorneys, and complain that in the record and proceedings, and also in the rendition of judgment in the above-entitled cause in said United States circuit court for the district of Washington, western division, at the February term thereof, A. D. 1896, against the said plaintiffs on the 28th day of May, A. D. 1896, manifest error hath intervened to the great damage of said plaintiffs.

Wherefore, the said plaintiffs pray for the allowance of a writ of error, and such other process as may cause the same to be
107 corrected by the said United States circuit court of appeals for the ninth circuit.

ASHTON & CHAPMAN,
F. M. DUDLEY,
Attorneys for Plaintiffs.

Allowed: WM. B. GILBERT, *Judge.*

Filed in the U. S. circuit court Sep. 9, 1896.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dep.*

And afterwards, to wit, on Wednesday, the 21st day of October, 1896, the same being the 28th judicial day of the regular July term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

United States Circuit Court for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, T. F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers Thereof, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.
} Case No. 193.

Order of Substitution.

108 On this 21st day of October, A. D. 1896, came on for hearing at chambers the application of plaintiff in above action for an order substituting as plaintiff The Northern Pacific Railway Company. It appearing to the court that the Northern Pacific Railway Company has acquired by purchase the rights of plaintiffs in and to the property described in the complaint, and it further appearing that all rights of said plaintiffs have been transferred to said company, and that said company is the necessary and proper party plaintiff:

It is, therefore, ordered that said Northern Pacific Railway Company be, and it is hereby, substituted as plaintiff in the above action. It is further ordered upon application of said plaintiff that a bond on appeal may be given in said cause by The Northern Pacific Railway Company, the substituted plaintiff in said action, with the same force and effect as though given by the original plaintiffs, and that all proceedings hereafter be in the name of said Northern Pacific Railway Company, as plaintiff. It is further ordered that the amount of bond on appeal, being for cost, be, and the same is hereby, fixed at the sum of one thousand dollars, and that the same be given in the usual form.

C. H. HANFORD, *Judge.*

Filed in the U. S. circuit court Oct. 21, 1896.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dep.*

STATE OF WASHINGTON, } ss:
County of Pierce, }

W. L. Sahse, being duly sworn upon oath, deposes and says
109 that he is a citizen of the United States of America, and is over the age of twenty-one years, and is competent to be a witness in all the courts of justice; that on the 21st day of October, 1896, he served the within order upon Achilles W. Ballard, at his office in the California block, Tacoma, Washington, one of the attorneys for defendant herein, by then and there delivering to and leaving with said Ballard a true copy of the within order, and further saith not.

W. L. SASHE.

Subscribed and sworn to before me by the said W. L. Sahse this 21st day of October, 1896.

A. G. AVERY,
Notary Public, Residing at Tacoma, Washington.

And afterwards, to wit, on the 26th day of October, 1896, there was duly filed in said court, in this cause, a bond on writ of error, in the words and figures as follows, to wit:

110 United States Circuit Court for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, T. F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of said Northern Pacific Railroad Company, Plaintiffs, vs. JAMES DE LACEY, Defendant. } No. 193.

Bond on Writ of Error.

Know all men by these presents, that the City Trust, Safe Deposit and Surety Company, of Philadelphia, Pennsylvania, a corporation organized and existing under the laws of said State of Pennsylvania, is held and firmly bound unto James De Lacey, of Tacoma, Washington, the defendant in the above-entitled action, in the penal sum of one thousand ($1,000) dollars, for the payment of which well and truly to be made unto the said James De Lacey, the said City Trust, Safe Deposit and Surety Company hereby binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal and dated this 23rd day of October, 1896.

The conditions of the above obligation are such that whereas, heretofore, to wit, on the 28th day of May, 1896, on motion
111 of attorneys for defendant, judgment was entered by the above-entitled court dismissing said above-entitled action; and

Whereas, subsequent to the entry of said judgment of dismissal steps were taken in said action by the plaintiffs therein for the purpose of appealing from said judgment dismissing said action to the United States circuit court of appeals for the ninth circuit, holding terms at the city of San Francisco; and

Whereas, subsequently, by an order made by the above-entitled court on the 16th day of September, 1896, and filed in said case on the 21st day of October, 1896, The Northern Pacific Railway Company was substituted as plaintiff in the above-entitled action in lieu and stead of said Northern Pacific Railroad Company, T. F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of said Northern Pacific Railroad Company, and said order also fixed the amount of the appeal bond in said case at the sum of one thousand (1,000) dollars.

Now, therefore, if the said City Trust, Safe Deposit and Trust Company shall pay, or cause to be paid, all costs that may be

awarded by said United States circuit court of appeals against the Northern Pacific Railway Company, or against any of the plaintiffs in the above-entitled action by reason of said appeal, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

In witness whereof the said City Trust, Safe Deposit and Surety Company has hereunto set its hand and affixed its corporate
112 seal, attested by its secretary, this 23 day of October, A. D. 1896.

THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY,
By L. R. MANNING, *Its Vice-President.*

Executed in the presence of—
A. P. PRICHARD.
J. L. PENTECOST.

[CORPORATE SEAL.]

Attest: W. PRICHARD,
Its Assistant Secretary.

The foregoing bond is hereby approved this 24th day of October, 1896.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed in the U. S. circuit court October 26, 1896. A. Reeves Ayres, clerk; Sam'l D. Bridges, dep.

UNITED STATES OF AMERICA, } ss:
District of Washington, }

Clerk's Certificate to Transcript.

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, in the ninth circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages contain a true and complete transcript of the record and proceedings in said court in the cause of The Northern Pacific Railroad Company *et al.*, plaintiffs in error, *vs.* James De Lacey, defendant in error, as the same are made of record and in file in my office at Tacoma.

113 In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of Tacoma, in the district of Washington, in the ninth circuit, this sixth day of November, in the year of our Lord one thousand eight hundred and ninety-six, and the Independence of the United States the one hundred and twenty-first.

[SEAL.]

A. REEVES AYRES, *Clerk,*
By SAM'L D. BRIDGES, *Deputy.*

UNITED STATES OF AMERICA, } ss:
District of Washington, }

I, A. Reeves Ayres, clerk of the circuit court of the United States, for the district of Washington, do hereby certify that the cost of the foregoing record amounts to the sum of $36.00, and that the same has been paid in full by the plaintiff in error.

In testimony whereof, I hereunto set my hand and the seal of said court this 6th day of November, A. D. 1896.

[SEAL.] A. REEVES AYRES, *Clerk*,
By SAM'L D. BRIDGES, *Deputy*.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges
114 of the circuit court of the United States for the district of Washington, western division, Greeting:

Because in the record and proceedings, as also in the rendition of a plea which is in the said circuit court, before you, or some of you, between The Northern Pacific Railroad Company, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse as receivers of said company and The Northern Pacific Railway Company, substituted as party plaintiff in lieu and stead of said Northern Pacific Railroad Company, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of said Northern Pacific Railroad Company, by the order of said circuit court entered herein on the 16th day of October, 1896, plaintiff-, and James De Lacey, defendant, a manifest error hath happened, to the great damage of the said Northern Pacific Railroad Company, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers thereof, and the said Northern Pacific Railway Company, substituted as party plaintiff as aforesaid, as is said and appears by the complaint: we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the justices of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the
city of San Francisco, California, together with this writ, so
115 that you have the same at the said place, before the justices aforesaid, on the 20th day of November next, that the record and proceedings aforesaid being inspected, the said justices of the said circuit court of appeals may cause further to be done therein, to correct that error, what of right and according to law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21st day of October, in the year of our Lord one thousand eight hundred and ninety-six, and

of the Independence of the United States the one hundred and twenty-first.

[SEAL.] A. REEVES AYRES,
Clerk United States Circuit Court, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

The foregoing writ is hereby allowed.

C. H. HANFORD,
Presiding Judge.

UNITED STATES OF AMERICA, } ss:
District of Washington, }

I do hereby certify that I received the within writ on the 26th day of October, 1896, and after due and diligent search was unable to find and serve James De Lacey, defendant in error in the
116 within-entitled action. And I further return that I personally served the within writ on A. W. Ballard, of the firm of Ballard & Norris, attorneys of record of the said James De Lacey, at Tacoma, on the 26th day of October, 1896, by delivering to and leaving with the said Ballard a copy of the within writ duly certified to be such by A. Reeves Ayres, clerk of the United States circuit court.

JAMES C. DRAKE,
United States Marshal for the District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

Marshal's fees, $4.00.

(Endorsed:) Filed in the U. S. circuit court. Oct. 29, 1896. A. Reeves Ayres, clerk, by Sam'l D. Bridges, deputy.

Citation.

UNITED STATES OF AMERICA, ss:

To James De Lacey, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be holden in the city of San Francisco, California, on the 20th day of November, 1896, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Washington, western division, wherein The Northern Pacific Rail-
road Company, Thomas F. Oakes, Henry C. Payne, and
117 Henry C. Rouse, as receivers of said Northern Pacific Railroad Company, The Northern Pacific Railway Company, substituted as party plaintiff in lieu and stead of said Northern Pacific Railroad Company, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of said Northern Pacific Railroad Company, by the order of said circuit court entered on the 16th day of October, 1896, *is* plaintiff- in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ

of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

C. H. HANFORD, *Judge.*

Dated October 21st, 1896.

Attest:

[SEAL.] A. REEVES AYRES,
Clerk United States Circuit Court, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

UNITED STATES OF AMERICA, *District of Washington,* } *ss:*

I do hereby certify that I received the within writ on the 26th day of October, 1896, and after due and diligent search was unable to find and serve James De Lacey, defendant in error in the within-entitled action. And I further return that I personally served the within writ on A. W. Ballard, of the firm of Ballard & Norris, attorneys of record of the said James De Lacey, at Tacoma, on the 26th day of October, 1896, by delivering to and leaving with
118 the said Ballard a copy of the within writ, duly certified to be such by A. Reeves Ayres, clerk of the United States circuit court.

JAMES C. DRAKE,
United States Marshal for the District of Washington,
By C. D. BRIDGES, *Deputy.*

Marshal' fees, $4.24.

(Endorsed:) Filed in the U. S. circuit court. Oct. 29, 1896. A. Reeves Ayres, clerk, by Sam'l D. Bridges, clerk.

(Endorsed:) No. 339. In the United States circuit court of appeals for the ninth judicial circuit. Northern Pacific Railway Co. (substituted for N. P. R. R. Co. *et al.*), plaintiff in error, *v.* James De Lacey, defendant in error. Transcript. In error to the United States circuit court for the district of Washington, western division. Filed Nov. 13, 1896. F. D. Monckton, clerk.

119 In the United States Circuit Court of Appeals for the Ninth Circuit, Holding Terms at San Francisco, California.

THE NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of said Northern Pacific Railroad Company; The Northern Pacific Railway Company, Substituted as Plaintiff,

vs.

JAMES DE LACEY, Defendant.

On appeal from the judgment of the honorable United States circuit court, ninth circuit, western division of Washington, holding terms at Tacoma, to the honorable United States circuit court of appeals for the ninth circuit, holding terms at San Francisco, California.

Now comes the appellee, James De Lacey, and moves this honorable court for an order dismissing said appeal and for a judgment herein for the following reasons, among others:

1st. There is no law or precedent for a second appeal from the trial court to this honorable court when, as in this case, on appeal from final judgment to this court, on trial, opinion rendered, filed, and entered, directing entry of judgment in the honorable court below in accordance with the opinion, to which judgment and opinion no exceptions were taken, no review asked, no steps taken to appeal therefrom, or otherwise review said cause and judgment, and the mandate issued to and filed in the honorable circuit — of the United States of the 9th circuit, western division of Washington, the trial court, and judgment entered therein in compliance with the said mandate.

120 2nd. This appeal is dilatory, vexatious, and causes the appellee unnecessary costs and expenses in appearing and attending this honorable court at great loss of time and expense, to his damage in the sum of three hundred and fifty (350) dollars, *which* costs, attorneys' fees, and expense made necessary on account of this unauthorized, dilatory, and vexatious appeal, and for which sum of $350.00, costs, expense, attorneys' fees, and damages appellee asks an allowance and judgment.

3rd. That the above cause was tried on its merits, facts found, and judgment entered in the said honorable circuit court of the United States, 9th circuit, western division of Washington, at Tacoma, on the 13th day of September, 1894, and final judgment entered therein; from which judgment the defendant (this appellee) appealed to the honorable United States circuit court of appeals, where same was tried in San Francisco, California, and judgment and opinion there entered on the 3rd day of February, 1896, reversing the lower court and directing judgment in the court below entered in accordance with said opinion; and to said judgment no exceptions were entered or made, no motion made for revew, no proceedings taken to appeal, review, or modify or overrule same. The mandate issued directing judgment, and mandate filed in the honorable circuit court of the United States, 9th circuit, western division of Washington, and on the 28th day of May, 1896, said honorable court entered final judgment in said cause in compliance with said mandate and opinion of this honorable court of appeals; from which judgment this second appeal is taken. And for these reasons aforesaid appellee moves for dismissal and judgment herein.

121 This motion is based upon the records of said cause now in this court, and which records are made part of this motion.

JAMES DE LACEY, *Appellee*,
By BALLARD & NORRIS,
His Attorneys.

Offices: Rooms 424 & 425 California block, Tacoma, Washington.

Received copy of the above motion this 6th day of November, 1896.

F. M. DUDLEY,
Att'y for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Pierce, }

H. F. Norris, being first duly sworn, on his oath states that he is and was at all times herein mentioned over the age of 21 years; that he received the within and foregoing instrument or motion for service on the 6th day of November, A. D. 1896, and on the 6th day of November, 1896, he duly served the same upon the plaintiff substituted, to wit, upon the said Northern Pacific Railway Company, appellant, by delivering a true copy thereof to W. O. Chapman, one of the attorneys of record of said plaintiff, and a member of the firm of Ashton & Chapman, attorneys of record in said cause for the plaintiff and appellant, at his office in Tacoma, Pierce Co., Washington, personally.

That affiant duly served said instrument upon said appel-
122 lant by leaving with and delivering to Wm. L. Sahse, principal law clerk in charge of the law office of Crowley & Grosscup, attorneys for said appellant, in the headquarters building of said appellant in the city of Tacoma, Pierce county, Washington, said Crowley & Grosscup being then and there the resident attorneys for said Northern Pacific Railway Company, personally, a true copy of said motion; and said Wm. L. Sahse, as such law clerk in charge of said office, duly receipted therefor by signing the name of "F. M. Dudley, attorney for plaintiff," in my presence, on the said 6th day of November, 1896, in Tacoma, Pierce county, Washington.

H. F. NORRIS.

Subscribed and sworn to before me this November 7th, 1896.

[SEAL.] E. STEINBACH,
Notary Public in and for the State of Washington, Residing at Tacoma, W'n.

(Endorsed:) No. 339. U. S. circuit court of appeals, 9th circuit. N. P. R. R. Co. *et al. v.* James De Lacey. Motion to dismiss cause. Filed Nov. 13, 1896. F. D. Monckton, clerk.

123 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY (Substituted for Northern Pacific Railroad Company *et al.*), Plaintiff in Error,
v.
JAMES DE LACEY, Defendant in Error. } No. 339.

In error to the circuit court of the United States for the district of Washington, western division.

This cause having been called for hearing in its regular order and a motion to dismiss having been filed, argued, and submitted

to the court for consideration and decision, and the same having been duly considered—

It is now here ordered and adjudged by this court that the said motion be, and the same is hereby, denied, and that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

(Endorsed:) U. S. circuit court of appeals for the ninth circuit. Northern Pacific R'y Co., pl'ff in error, *v.* Jas. De Lacey. Judgment. Filed Feb. 8th, 1897. F. D. Monckton, clerk.

124 United States Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY (Substituted for the Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of said Northern Pacific Railroad Company), Plaintiff in Error,

vs.

JAMES DE LACEY, Defendant in Error.

Now comes the above-named plaintiff in error and prays this court for a writ of error in the above-entitled action to the United States circuit court of appeals for the ninth circuit to review the judgment entered in said court on the 8th day of February, 1897, in favor of said defendant in error and against said plaintiff in error and affirming the judgment of the United States circuit court for the district of Washington, western division, entered on the 28th day of May, 1896, for the reason that manifest error hath intervened in the rendition of such judgment of said United States circuit court of appeals for the ninth circuit, to the great damage of said plaintiff in error.

Dated June 12th, A. D. 1897.

C. W. BUNN &
F. M. DUDLEY,
Attorneys for Plaintiff in Error.

(Endorsed:) In United States Supreme Court. Northern Pacific Railway Company, plaintiff in error, *vs.* James De Lacey, defendant in error. Petition for writ of error. Filed July 3, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

125 In the United States Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY (Substituted for the Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of said Northern Pacific Railroad Company), Plaintiff in Error,

vs.

JAMES DE LACEY, Defendant in Error.

Assignment of Errors.

Now comes the above-named Northern Pacific Railway, plaintiff in error, substituted for The Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as

receivers of said Northern Pacific Railroad Company, by C. W. Bunn and F. *D.* Dudley, its attorneys, and says that in the records and proceedings in the above-entitled action in the United States circuit court of appeals for the ninth judicial circuit there is manifest error in this, to wit:

I.

The plaintiff in error assigns as error the several errors set out in the assignment of errors forming part of the record in the above-entitled action before the said circuit court of appeals, to wit:

II.

That the court erred in overruling the demurrer of the plaintiff, the plaintiff in error herein, to the affirmative defense set forth in the answer of the defendant, the defendant in error herein.

III.

That the court erred in refusing to order a new trial and in entering judgment without the intervention of a jury upon the motion of the defendant, the defendant in error herein.

126 IV.

That the court erred in rendering judgment granting to the defendant, defendant in error herein, equitable relief, in that it was decreed and adjudged that the patent issued to the said Northern Pacific Railroad Company for the land described in the complaint herein, which patent is dated December 13, 1892, is null and void.

V.

That the court erred in failing and refusing to hold that the patent of the United States issued to the said Northern Pacific Railroad Company December 13, 1892, conveyed to the said Northern Pacific Railroad Company the legal title to the land in controversy, and that the plaintiff, the plaintiff in error herein, is entitled to recover in this action.

VI.

That the court erred in entering judgment not sustained by the findings of fact.

VII.

That the court erred in failing and declining to hold that the plaintiff, the plaintiff in error herein, is the owner of and entitled to the possession of the land in controversy.

VIII.

Plaintiff in error assigns as further errors that the said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the district of Washington, western division, erred

in making its order on the 8th day of February, 1897, affirming the judgment of the said circuit court of the United States for the district of Washington, western division.

127 IX.

That the said circuit court of appeals erred in not sustaining the writ of error before it in this action and in not reversing the judgment of the said circuit court rendered in this action, and in not directing a new trial on the issues raised by the pleadings in this action.

X.

And the said Northern Pacific Railway Company, the plaintiff in error herein, prays that the judgment aforesaid, entered by the United States circuit court for the district of Washington, western division, on the 28th day of May, 1896, and the judgment entered herein by the said United States circuit court of appeals on the 8th day of February, 1897, affirming the said judgment of said United States circuit court of May 28th, 1896, for the errors aforesaid and for other error in the record and proceedings in this action, be reversed and annulled and altogether held for naught, and that the mandate of this court may issue directing a new trial of the issues raised by the pleadings herein.

C. W. BUNN &
F. M. DUDLEY,
Attorneys for Northern Pacific Railway Company,
Plaintiff in Error.

Dated June 12th, 1897.

(Endorsed:) In United States Supreme Court. Northern Pacific Railway Company, plaintiff in error, *vs.* James De Lacey, defendant in error. Assignment of errors. Filed July 3, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

128 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY (Substituted for the Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company), Plaintiff in Error,
vs.
JAMES DE LACEY, Defendant in Error.

Know all men by these presents that we, the said Northern Pacific Railway Company, a corporation created and organized under and by virtue of the laws of the State of Wisconsin, the above-named plaintiff in error, by James B. Kerr, its counsel, for the said Northern Pacific Railway Company, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto the above-named James De Lacey, defendant in error, in the sum of five hundred dollars ($500.00), lawful money of the United States, to be paid to the said James De Lacey, his

executors, administrators, and assigns; to the payment of which, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this twelfth day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

The conditions of the above obligation are such that—

Whereas heretofore, to wit, on the 28th day of May, 1896, judgment was entered in the circuit court of the United States for the district of Washington, western division, on motion of attor-
129 neys for the defendant, dismissing the above-entitled action; and

Whereas, subsequent to the entry of said judgment of dismissal, the Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the said Northern Pacific Railroad Company, sued out a writ of error in the United States circuit court of appeals for the ninth circuit to the United States circuit court for the district of Washington, western division, to reverse the said judgment in the said circuit court of the United States for the district of Washington, western division; and

Whereas, by an order made by said United States circuit court for the district of Washington, western division, on the 21st day of October, A. D. 1896, and entered in said cause on the said 21st day of October, A. D. 1896, the Northern Pacific Railway Company was substituted as plaintiff in the above-entitled action in the place and stead of the said Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the said Northern Pacific Railroad Company; and

Whereas thereafter and on the 8th day of February, A. D. 1897, the said United States circuit court of appeals for the ninth circuit entered its judgment affirming the said judgment of the 28th day of May, 1896, of the said United States circuit court for the district of Washington, western division; and

Whereas the said Northern Pacific Railway Company, substituted as plaintiff herein in the place and stead of the said Northern Pacific Railroad Company and Thomas F. Oakes, Henry C.
130 Payne, and Henry C. Rouse, as receivers of the said Northern Pacific Railroad Company, has prosecuted a writ of error in the United States Supreme Court to the United States circuit court of appeals for the ninth *district* to reverse said judgment rendered by the said United States circuit court of appeals herein under date of February 8, 1897, affirming said judgment of the circuit court of the United States for the district of Washington, western division, rendered under date of May 28, 1896, dismissing the above-entitled action:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railway Company shall prosecute said writ of error to effect and shall cause to be paid all costs that may be awarded by said Supreme Court of the United States against the said Northern Pacific Railway Company or against any

of the above-named plaintiffs in the above-entitled action by reason of said writ of error, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

In witness whereof the parties hereto have hereunto set their hands and seals this 12th day of June, A. D. 1897.

NORTHERN PACIFIC RAILWAY COMPANY,
By JAMES B. KERR, *Its Counsel.*
AMERICAN SURETY COMPANY OF NEW YORK,
By THOS. B. SCOTT,
Resident Vice-President.
[SEAL.] ARTHUR M. WICKWIRE,
Acting Resident Assistant Secretary.

In presence of—
E. S. EDGERTON.
A. B. C. DURFEE.

Registered for American Surety Co. of N. Y. by Northern Exchange bank, St. Paul, Minn., by A. M. Du Bord.
131 M. & E.

STATE OF MINNESOTA, } ss:
County of Ramsey, . }

Be it remembered that on the 12th day of June, A. D. 1897, before me personally appeared Thomas B. Scott and Arthur M. Wickwire, to me personally known, who, being by me severally sworn, say: The said Thomas B. Scott says that he is the resident vice-president of the American Surety Company of New York, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors.

And the said Arthur M. Wickwire says that he is the acting resident assistant secretary of said company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors.

And the said Thomas B. Scott and the said Arthur M. Wickwire each acknowledge the said instrument to be the free act and deed of said corporation.

[SEAL.] LOUIS H. TEXLER,
Notary Public, Ramsey County, Minnesota.

Approved by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) No. 339. United States circuit court of appeals, ninth circuit. Northern Pacific Railway Company, plaintiff in error, *vs.* James De Lacey, defendant in error. Bond on writ of

error. Filed July 3, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

132 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY (Substituted for Northern Pacific Railroad Company *et al.*), Plaintiff in Error,
v.
JAMES DE LACEY, Defendant in Error. } No. 339.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and thirty-one pages, numbered from one to one hundred and thirty-one, both inclusive, to be a true copy of the record and of the assignment of errors, including the judgment filed, and of all proceedings in the above-entitled case, as the same appear of record in said circuit court of appeals, and that the same constitute the return to the annexed writ of error.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 28th day of July, 1897.

F. D. MONCKTON, *Clerk*.

133 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railway Company (substituted for The Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of said Northern Pacific Railroad Company), plaintiff in error, and James De Lacey, defendant in error, a manifest error hath happened, to the great damage of the said The Northern Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

134 [Endorsed:] Dock. 339. United States circuit court of appeals for the ninth circuit. Northern Pacific Railway Company, plaintiff in error, *v.* James De Lacey, defendant in error. Writ of error. Filed July 3d, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States, within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

135 UNITED STATES OF AMERICA, *ss:*

To James De Lacey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Northern Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 23d day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

136 [Endorsed:] Dock. No. 339. United States circuit court of appeals for the ninth circuit. The Northern Pacific Railway Company, &c., plaintiff in error, *v.* James De Lacey, defendant in error. Citation. Filed July 13th, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

On this seventh day of July, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared M. H. Palmer before me, the subscriber, W. L. Sahse, a notary public in and for the State of Washington, residing at Tacoma, in said State, and makes oath that he delivered a true copy of the within citation to Homer F. Norris, one of the attorneys of record for the defendant in error herein.

M. H. PALMER.

Sworn to and subscribed the 7th day of July, A. D. 1897.

{ Seal of W. L. Sahse, Notary Public, State of Washington. Expiration of Commission, Jan. 8, 1899. }

W. L. SAHSE,
Notary Public.

Endorsed on cover: Case No. 16,655. U. S. circuit ct. of appeals, ninth circuit. Term No., 154. The Northern Pacific Railway Company, plaintiff in error, *vs.* James De Lacey. Filed August 21st, 1897.

No. 164.

Brief of Bunn for

Office Supreme Court U. S.
FILED
JAN 18 1899
JAMES H. MCKENNEY
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 164.

Filed Jan. 18, 1899.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

JAMES DE LACEY.

BRIEF FOR PLAINTIFF IN ERROR.

C. W. BUNN,
JAMES B. KERR,
Counsel for Plaintiff in Error.

PIONEER PRESS CO., ST. PAUL, MINN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 154.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

JAMES DE LACEY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error to the circuit court of appeals for the Ninth Circuit, brought to review a judgment of that court affirming a judgment of the circuit court for the District of Washington, rendered in favor of James De Lacey, dismissing an action brought against him by the Northern Pacific Railroad Company, the predecessor of the plaintiff in error.

The action was ejectment, brought by the Northern Pacific Railroad Company in the circuit court, to recover possession of the southwest

quarter of the northeast quarter, the southeast quarter of the northwest quarter, and the east half of the southwest quarter of section 21, township 20 north, range 3 east of Willamette meridian, Pierce county, Washington.

The action was tried before the court, a jury being waived, and upon the findings of the court, judgment was entered in favor of the plaintiff. The defendant, James De Lacey, thereupon sued out a writ of error in the circuit court of appeals for the Ninth Circuit to review this judgment. That court reversed the judgment of the circuit court and remanded the case for further proceedings not inconsistent with its opinion. The circuit court refused to grant a new trial, and judgment was entered upon the findings, dismissing the plaintiff's complaint. To review this judgment the plaintiff sued out a writ of error in the circuit court of appeals, and judgment was thereafter entered affirming the judgment of the circuit court. It is to review this judgment that the writ of error is brought.

The action was commenced by the Northern Pacific Railroad Company, but by order of court the receivers of that company were afterward made parties. (Transcript, p. 26.) Subsequently, the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, and the receivers, was substituted as plaintiff. (Transcript, p. 56.)

The complaint alleges that the plaintiff is the owner and entitled to the possession of the land in controversy, and that the defendant has wrongfully entered thereon and withholds the possession. (Transcript, p. 1.)

The answer admits the possession of the premises by the defendant, but denies that plaintiff is the owner. The answer further contains what is denominated an "affirmative defense" wherein it is alleged that the plaintiff claims title to land in controversy under the act of congress of July 2, 1864, granting lands to aid in the construction of the Northern Pacific Railroad from Lake Superior to Puget's Sound. The answer alleges that the land in question was excepted from this grant, and that in 1886 the defendant, qualified to enter land under the homestead law, settled thereon and made application to enter the same as a homestead, but that his application was rejected because of conflict with the grant to the Northern Pacific Railroad Company.

It is alleged further that in the year 1892, a patent for the land was issued to the Northern Pacific Railroad Company, but that the same was unlawfully issued. The answer concludes with a prayer for judg-

ment that the patent be cancelled, that the plaintiff take nothing by the suit, and that it be adjudged that the defendant is lawfully in possession of the premises. (Transcript, 20-24.)

To the affirmative defense contained in the answer the plaintiff interposed a demurrer. (Transcript, 25.) This demurrer was overruled and an exception allowed. (Transcript, 26.)

Upon the trial the following facts were found by the court:

By act approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line, from Lake Superior to Puget's Sound on the Pacific Coast, by the Northern route," congress granted to the Northern Pacific Railroad Company "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States * * * and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office." (Finding I, Transcript, 36.)

On March 26, 1884, the Northern Pacific Railroad Company filed in the office of the commissioner of the general land office its map of definite locotion of that portion of its branch line, extending from Tacoma to South Prairie. The land in controversy is within twenty miles of this line of definite location. (Finding X, Transcript, 39.)

The road opposite the land was duly constructed and accepted by the president upon the report of commissioners appointed to examine the same. (Finding XI, Transcript, 39.)

April 9, 1869, one John Flett filed declaratory statement No. 1227, declaring his intention to purchase the land in controversy under the laws of the United States, authorizing the pre-emption of unoffered lands. (Finding XII, Transcript, 40.)

In the fall of 1869, Flett left the land in controversy, and did not thereafter reside thereon, although it is recited in the decision of the Secretary of the Interior in a contest between the Railroad Company, De Lacy, Flett and others, involving the land in controversy, that in September, 1870, Flett went to the local land office and told the officers that he had come to prove up on his claim, that they told him it was railroad land, and that he has lost it; that Flett did not actually offer to make proof, but acquiesced in the advice of the local officers that he was not entitled to make proof under his filing. (Finding XIII, Transcript, 40.)

The defendant, James De Lacey, settled upon the land in April, 1886. April 5, 1886, he applied to make homestead entry. His application was rejected for conflict with the Northern Pacific grant. From this decision by the register and receiver, De Lacy appealed to the commissioner of the general land office. (Finding XV, Transcript, 40.)

September 7, 1887, John Flett submitted proof in support of his pre-emption claim, founded upon his declaratory statement, filed April 9, 1869. (Finding XVI, Transcript, 40.)

Afterwards under the instructions of the commissioner of the general land office, a hearing was had before the district land office, at which all parties were represented. July 27, 1889, the receiver of the district land office found that Flett had not voluntarily abandoned the land in 1869, and that his entry should be reinstated. From this finding all the parties but Flett appealed to the commissioner of the gen eral land office, and on December 5, 1889, that officer sustained the finding of the receiver. Thereafter, the other parties appealed to the secretary of the interior, and on September 28, 1891, the secretary reversed the ruling of the commissioner and awarded the land in controversy to the Northern Pacific Railroad Company. December 13, 1892, letters patent of the United States, regular in form, were issued conveying the land to the railroad company. (Finding XVII, Transcript, 40.)

Flett's declaratory statement was not formally canceled upon the records until December 23, 1891. (Finding XIX, Transcript, 41.)

ASSIGNMENT OF ERRORS.

The errors are duly assigned. (Transcript, pp. 64, 65, 66.)

ARGUMENT.

From the foregoing statement it appears that the land in question is situated within the primary limits of the grant by act of congress of July 2, 1864, in aid of the branch line of the Northern Pacific Railroad over the Cascade mountains, as defined by the map of definite location filed March 26, 1884. Under the act of 1864, the Cascade branch was part of the main line from Lake Superior to Puget's Sound, but by the joint resolution of May 31, 1870, this line was designated as the branch and the former branch, authorized under the act of 1864, was designated as the main line, and the company authorized to extend the same via the valley of the Columbia river to Puget's Sound.

U. S. vs. N. P. R. R. Co., 152 *U. S.*, 284.

It appears from the record that the land in question is also situated within the primary limits of the grant for the extended main line, located between Portland and Tacoma, under the joint resolution of May 31, 1870, but the rights of the company under the act of July 2, 1864, being prior, this fact may be disregarded.

The question upon which this case was decided, in both the trial court and in the circuit court of appeals, was whether the pre-emption declaratory statement of Flett, filed April 9, 1869, constituted such a claim to the land at the time of the filing of the map of definite location, March 26, 1884, as excepted it from the grant to the railroad company.

Section 2267 of the Revised Statutes was adopted July 14, 1870, and amended March 3, 1871. The pre-emption law relating to *unoffered* land had contained before that date no similar provision. That section is as follows:

"All claimants of pre-emption rights under the two preceding sections shall, when no shorter time is prescribed by law, make the proper proof and payment for the lands claimed within thirty months after the date prescribed therein, respectively, for filing their declaratory notices has expired."

This section was applicable to the Flett filing.

The circuit court, in an opinion by Judge Gilbert, held that the claim of Flett was extinguished by abandonment before the filing of the map of definite location by operation of law. The court said:

"The material fact in this case is that at the time the line was definitely located the claim of Flett no longer attached, but had been extinguished. It is immaterial whether it was extinguished by a proceeding in the land office resulting in a cancellation of the entry, or by the voluntary action of the claimant amending his entry and releasing the lands, as in the Amacker case, or by the abandonment and forfeiture of the claim, as in the case now under consideration. The defendant relies upon the fact that the Flett entry remained uncancelled until 1891. A declaratory pre-emption statement, on file prior to and at the time the grant was made, would be proof of the intention of congress to exclude from the grant the land covered thereby; and such an entry in the files of the land office, made after the date of the grant, and remaining in existence at the time of the definite location, so as to furnish evidence of a claim that might ripen into a title by compliance with the land laws, would likewise serve to exclude the land from the grant, for it was not the intention of the grant, as construed by the decisions, to permit an inquiry into the *bona fides* of such a claim, or the performance of the conditions which rested upon the elaimant. But here it is not only admitted by both parties to the action that Flett abandoned and forfeited his claim in 1871, but the very right of the defendant to possess and claim the

land is predicated upon such abandonment by Flett, and the extinction of Flett's claim. Such an admission must be held to destroy the effect and force of the entry in the land office. The court will not regard the existence of an entry the life of which is admitted to have expired, but must be guided by the admitted facts. It must be held, therefore, that the land in controversy was public land, subject to the grant in 1864 and free from any claim that would exempt it therefrom in 1884, when the line of the road was definitely located." (Transcript, 33.)

The circuit court of appeals held, however, that it was immaterial that Flett had abandoned the land and all rights under his filing had become extinguished by lapse of time. The conclusion was reached that because the filing had never been formally cancelled of record when the map of definite location was filed, it constituted such a claim to the land as excepted it from the grant, and this conclusion was reached under the decision of this court in *Whitney vs. Taylor*, 158 *U. S.*, 85.

De Lacey vs. Northern Pacific Railroad Co., 44 *U. S. Appeals*, 257, 270; 72 *Fed. Rep.*, 726, 732.

Section 2267, prescribing the time within which proof and payment must be made under the pre-emption law for *unoffered* land was not in force when the facts arose which were involved in *Whitney vs. Taylor*.

The question is presented, therefore, whether an expired pre-emption declaratory statement will except land from a railroad grant.

As will be shown, prior to the decision in *Whitney vs. Taylor*, it had been the settled practice of the interior department for more than fifty years to treat as of no force or effect declaratory statements under which proof and payment had not been made within the time fixed by statute.

The case of *Whitney vs. Taylor* was this:

One Jones had filed, on May 22, 1857, a pre-emption declaratory statement. The Central Pacific Railroad Company filed a map of definite location March 26, 1864; at that time there existed no limitation as to the time within which a pre-emptor should prove up and pay for his claim, except that it should be done before the land might be offered at public sale by proclamation of the president. The tract in dispute had not been so offered at the date of the definite location of the road and indeed had never been offered since. The ruling was that Jones' time to make proof and payment had not expired, and consequently his was an existing filing of record at the date of the definite location of the road. It was a claim which Jones could at

that time legally prove, and make title under. Mr. Justice Brewer, in the opinion, page 97, is careful to state that the land in controversy was not offered for public sale, being expressly excepted and excluded from such sale as mineral land. Quoting from Secretary Noble's decision, Mr. Justice Brewer says:

"It thus appears that the tract in question remained in the category of unoffered lands, and was not proclaimed for sale. The pre-emption act of March 3, 1843, provided that the settler on unoffered land might make proof and payment at any time before the commencement of the public sale, which should embrace his land. Until such time arrived the filing protected the claim of the settler. This was the status of the law at the time said company's rights attached and it so continued until modified by the act of July 14, 1870."

The inference is plain and irresistible, that had the land in controversy been offered for public sale by proclamation of the president, without Jones having proved up and paid, his filing would have thereby lapsed and expired by limitation and the land would have been subject to the grant.

It is submitted that it was not the intention of this court in deciding *Whitney vs. Taylor* to overthrow the long settled construction of the interior department upon this question. As has been said many times, the uniform practice of the department is strong evidence of the proper construction of the law and should not be overturned without cogent reason.

An examination of the pre-emption law is necessary both for the purpose of ascertaining the construction placed upon it by the department and of determining the nature of the pre-emptive right.

The first general pre-emption law, that of September 4, 1841 (5 Stat., 453), authorized settlement and entry upon proof and payment, on all public lands to which the Indian title had been extinguished, but provided for filing a declaratory statement only on lands subject at the time to private entry or "offered" lands. The settlement under this act on unoffered lands protected the settler until the land was offered at public sale.

Whitney vs. Taylor, supra.

The declaratory statement filed by a settler on offered land gave him a preferred right of purchase for twelve months from the date of his settlement.

In case the settler on offered land failed to make proof and payment within the twelve months prescribed, the land became "subject to the entry of any other purchaser."

Johnson vs. Towsley, 13 *Wall.*, 72.

The right of purchasing the land in preference to others, during the period limited by law, is the right of pre-emption.

Myers vs. Croft, 13 *Wall.*, 291.

"The right then to hold the land before payment is made therefor, upon promising to buy the same at a stipulated time, together with the right to purchase at such time, is the 'pre-emptive right.'"

J B. Raymond, 2 *Land Decisions*, 854.

Upon the failure of the settler upon *offered* land to make proof and payment within the twelve months prescribed by law, all rights in him, as a *pre-emptor*, expired. During that period the function of the declaratory statement was to protect the preferred right of purchase. When the twelve months expired the declaratory statement was *functus officio*, and thereafter conferred no rights whatsoever. Any applicant to purchase the land at private sale would take it and without notice of any kind to the settler. This was the construction of the interior department, from the beginning, as appears by the case of *J. B. Raymond, supra.*

Furthermore, the department held, as shown by the circular of September 28, 1842 (1 *Lester's Land Laws*, 369), cited in the Raymond case, that the failure on the part of the settler to make proof and payment, was sufficient to debar him from the privilege of making a private entry of the land upon which he had settled. This holding of the department, coming to the attention of congress, it was provided by act of March 3, 1843 (5 *Stat.* 619), in section 9 thereof, as follows:

"And said act (Act of September 4, 1841, *supra*) shall not be so construed as to preclude any person who may have filed a notice of intention to claim any tract of land by pre-emption under said act, from the right allowed by law to others to purchase the same by private entry *after the expiration of the right of pre-emption.*"

Thus it appears both by departmental construction and enactment of congress that upon the expiration of the twelve months within which a settler on offered lands was required to make proof and payment, the right of pre-emption expired and the settler was relegated to the class of citizens of the United States generally in whom there existed merely the right to purchase the land at private entry. All claim

on the part of the settler as a pre-emptor, and under the pre-emption law, ceased. His relation to the land thereafter was identical with that of any other citizen of the United States, there remaining in him no right with reference to the land, except the right which all other citizens enjoyed, to purchase it at private sale at $1.25 per acre.

The pre-emption act of March 3, 1843 (5 *Stat.* 619), for the first time provided for the filing of a declaratory statement on unoffered lands, or lands not proclaimed for sale.

Johnson vs. Towsley, supra.

Section 5 of that act provided:

"That claimants under the late pre-emption law, for land not yet proclaimed for sale, are required to make known their claims, in writing to the register of the proper land office, within three months from the date of this act when the settlement has been already made, and within three months from the time of the settlement when such settlement shall hereafter be made, giving the designation of the tract and the time of settlement; otherwise his claim to be forfeited, and the tract awarded to the next settler, in the order of time, on the same tract of land, who shall have given such notice, and otherwise complied with the conditions of the law."

Instructions under this act were issued May 8, 1843 (1 *Lester* 370, 374), and on March 10, 1869 (2 *Lester*, 237, 241), declaring that the settler on unoffered lands might make proof and payment at any time prior to the commencement of the public sales.

The pre-emption law remained unchanged until the passage of the act of July 14, 1870. (15 *Stat.*, 279.)

Malone vs. U. P. R. R. Co., 7 *Land Decisions*, 13.

By section 2 of said act of July 14, 1870, it was enacted that:

"* * * All claimants of pre emption rights shall, hereafter, when no shorter period of time is now prescribed by law, make the proper proof and payment for the lands claimed, within eighteen months after the date prescribed for filing their declaratory notices shall have expired; provided, that where said date shall have elapsed before the passage of this act, said pre-emptors shall have one year after the passage hereof in which to make such proof and payment."

Instructions were issued under this act by the interior department on July 30, 1870 (*Copp's Public Land Laws*, 1875, 291), and December 30, 1870. (*Ibid*, 306.)

By the former it was declared:

"The settler on surveyed 'unoffered land' must file his or her declaratory statement within three months from the date of his or her settlement on such land, and within eighteen months from the expiration of said three months, make the proper proof and pay for such land. Where settlers had already filed before the passage of the act, they are required to make proof and payment within one year from such passage, therefore all filings made prior to that date will expire, *by limitation of law*, upon unoffered lands on the 14th day of July, 1871."

The instructions of December 30, 1870, were:

"6th. You will treat all filings upon lands which have once been 'offered' as abandoned after the lapse of twelve months from the alleged settlement, which is the statutory limitation, and all filings upon 'unoffered' lands as *abandoned* after the lapse of twenty-one months after such alleged settlement or the filing of the township plats, unless within the period fixed by law proof and payment shall have been made, or legal tender of such proof and payment shall have been made and refused."

On March 3, 1871 (16 *Stat.*, 601), a joint resolution was passed providing:

"That settlers on the public lands of the United States who have been required to make proof and payment for their lands under the act to extend the provisions of the pre-emption laws to the territory of Colorado, and for other purposes, approved July 14, 1870, and by instructions from the general land office, under date of July 30, 1870, shall have twelve months' additional time given them under which to make such proof and payment."

Thereupon, on May 5, 1871 (*Copp's Public Land Laws*, 1875, 308), instructions were issued under said act as follows:

"The settler on surveyed 'unoffered land' must file his or her declaratory statement within three months from the date of his or her settlement on such land, and within thirty months from the expiration of said three months, make the proper proof and pay for such land. Where settlers had already filed before the passage of the act, they are required to make proof and payment within two years from such passage; therefore, all filings made prior to that date will expire *by limitation of law* upon unoffered lands on the 14th July, 1872."

The limit of eighteen months fixed by the act of 1870, and the extension of twelve months by the resolution of 1871 together make up the thirty months from the time prescribed for filing on unoffered lands, within which the settler on such land was required by section 2267 Revised Statutes to make proof and payment.

It is apparent from the facts in this case that the filing of Flett here in question, made April 9, 1869, expired long prior to the attachment of the company's grant. From that time the filing evidenced no right of any character based upon the pre-emption law. Nor has the statute intervened to give the settler on unoffered land any other or further right than the pre-emption law itself gave him.

The provisions of section 2272, Revised Statutes, are necessarily confined to settlers on unoffered lands. That section provides:

"Nothing in the provisions of this chapter shall be construed to preclude any person who may have filed a notice of intention to claim any tract of land by pre-emption, from the right allowed by law to others to purchase such tract by private entry after the expiration of the right of pre emption."

Inasmuch as unoffered lands are not subject to private entry, this section can have no reference to them, as there is no "right allowed by law to others to purchase such tract by private entry," and no such right is extended by this section to the settler on such lands.

The history of the enactment of section 2272, Revised Statutes, has been pointed out above, it appearing that the provision was originally appended to the pre-emption law of March 3, 1843, and referred solely to the right of pre-emption on offered lands conferred by the pre-emption law of September 4, 1841.

And before the decision in Whitney vs. Taylor, the rulings of the interior department were uniform that an expired pre-emption declaratory statement constituted no such claim as would except land from a railroad grant, although since that decision the department has to some extent changed its rulings in this regard.

The effect of expired declaratory statements was considered by the interior department in Railroad Company vs. Stovenour, 10 Land Decisions, 645. After argument, orally and by printed brief, and careful consideration, it was decided first, that a filing of record unexpired at the date of withdrawal on general route, excepts the land from such withdrawal, and also if unexpired at the date of definite location, it excepts the land from the grant; second, if, however, at either of these points of time, the filing had expired by statute, without the required proof and payment having been made, the presumption arises that any claim which had attached under such filing has been abandoned, and that the claim no longer exists.

To the same effect, among others, are the following decisions by the department:

Railroad Company vs. Moling, 11 *L. D.* 138;
Railroad Company vs. Kranick, 12 *L. D.* 384;
Kricklan vs. Railroad Company, 13 *L. D.* 22;
Railroad Company vs. Railroad Company, 13 *L. D.* 559;
St. Paul & Pacific R. R. Co., 13 *L. D.* 637.

The fact that declaratory statements, expired under the statute, were allowed to remain of record in no manner affects the question. It has not been the practice of the department to cancel such filings, but they have uniformly been treated as extinguished by operation of law.

Instructions of December 30, 1870, *supra.*

In circular of September 8, 1873, Commissioner Drummond said:

"By the operation of law limiting the period within which proof and payment must be made in pre-emption cases, such claims are constantly expiring, the settler not appearing within such time to consummate his entry. These expired filings are classed with those actually abandoned or relinquished."

1 *Copp's Land Owner*, 29.

In circular of November 8, 1879, it was said:

"Where application is made by a railroad company to select lands on which pre-emption filings have heretofore been made and canceled, or where the same have expired by limitation of law, no other claim or entry appearing of record, you will admit the selections, in accordance with the rules governing in the premises herein communicated. No proofs by the companies concerning such claims will hereafter be required."

6 *Copp's Land Owner*, 142.

January 13, 1885, the secretary of the interior said:

"An 'expired pre-emption filing' is no bar to receipt of an application for public lands, nor for suspension of an entry and is never considered as a bar to issue of patent. Nor is it the practice to enter formal cancellation of such filings upon the books, nor take any action concerning them; they are simply treated as abandoned claims."

State of Alabama, 3 *L. D.* 317.

Perhaps the clearest evidence of the construction placed by the department upon the pre-emption right and the light in which such claims

were regarded, is found in the fact that the local land officers were instructed when a declaratory statement was filed to note the same *in pencil* upon the tract books of their office.

Circular, September 15, 1841, 1 *Lester*, 360, 363;
Circular, May 8, 1843, 1 *Lester*, 370, 371.

And these instructions have never been modified. Such a record was sufficient to protect the rights of the settler during the period prescribed by the law, but by no means such a record as could properly be resorted to for the purpose of determining rights after the lapse of a quarter of a century.

And it is submitted that the proposition that an expired pre-emption claim will except land from a railroad grant finds a conclusive answer in the simple statement. The right of pre-emption, as the word implies, is the right to buy before another. It is the privilege which the possessor of the right enjoys and which no one else possesses, and of which no one can deprive him.

When the period fixed by the statute expired, however, the claimant had no right whatsoever which he would not have had if he had never gone through the formality of declaring his intention. His rights were those of any other citizen and any other citizen could have acquired the land in the same way and by the same means as would have been required if the declaratory statement had never been filed.

The law looks to the substance and not to the form. If the filing evidences a right vested or inchoate it should defeat the grant, but where it evidences no right, when all privileges which it conferred have by the lapse of time been withdrawn, and the man who made it stands in relation to the land in the same position as every other, there is nothing upon which to base the conclusion that the land is subject to a pre-emption claim.

In *Keane vs. Brygger*, 160 *U. S.*, 278, it appeared that the territory of Washington had selected for university purposes, under the act of congress, a tract of land which had theretofore been entered as a homestead. Before the selection, however, a relinquishment of the homestead entry had been filed but the entry had not been formally canceled of record. It was contended that the mere fact that the entry remained of record was sufficient to defeat the selection. This court observed that it was the policy of the law to protect the rights of a homestead claimant, but that where the right was in fact extinguished by the filing of a relinquishment, the selec-

tion could not be affected by the fact that the officers had failed to note the cancellation on the records.

The case at bar is entirely dissimilar to *Whitney vs. Taylor*, upon which the circuit court of appeals based its decision. That case, far from sustaining an exception from the company's grant of the land in question, is plain authority that the land is included in the grant. Mr. Justice Brewer, in *Whitney vs. Taylor*, states the rule in this language:

"The principle to be deduced from them (the decisions of this court) is, that when on the records of the local land office there is an *existing* claim on the part of an individual under the homestead or pre-emption law, *which has been recognized by the officers of the government*, and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses."

Declaratory statements, like that of Flett, since the passage of the act of 1870, after they are thirty months old, show on their face at a glance that they have expired and that they are no longer existing. Such a filing may not even appear canceled on the books of the land office, but it has been set aside by process of law. By the force of the statute it has ceased to exist and no formal cancellation of it is necessary, or has ever been held by this court to be necessary, to re move it from the record. The court used the words in the quotation above made from Mr. Justice Brewer's opinion "canceled, or *set aside*," with a purpose. The terms are not convertible. They evidently include both formal cancellation on the books and any other method for putting an end to a claim, including, we submit, surrender or abandonment by the pre-emptor, or what is tantamount to the same thing, failure to take any steps under the declaratory statement for more than thirty months.

The purpose of the exception, contained in the Northern Pacific and other railroad grants, of lands subject to pre-emption or other claims, as was said by this court in *Kansas Pacific R. Co. vs. Dunmeyer*, 113 *U. S.* 629, was to guard against the danger of placing the parties, the railroad company on the one hand and the pre-emption claimants on the other, as contestants for the land with the right in each to require proof from the other of the performance of its obligation. But where by the expiration of the right of pre-emption the claimant no longer enjoys any privileges in respect to the land which are not enjoyed equally by every other citizen, the record evidences no claim which can be the subject of a contest, and to hold that the land is included within the terms of the grant can no more render the

railroad company the contestant and antagonist of the man who made the filing than of every other whose rights in the land are the same as his.

II.

Furthermore, it appears from the record in this case that on December 13, 1892, the patent of the United States was issued to the Northern Pacific Railroad Company, conveying the land in controversy. And this patent was issued after a contest between the railroad company, the defendant James De Lacey, and John Flett, in which a decision was rendered by the secretary of the interior on September 28, 1891, awarding the land to the railroad company. (Finding XVII, Transcript p. 40.)

It is submitted that, although it should be held that the Flett filing, remaining uncanceled when the company filed its map of definite location, was *prima facie* sufficient to except the land from the grant, yet the presumption arising from the issuance of the patent must defeat this claim. The patent, issued as it was after a contest in the department, declares the judgment of the officers that the land was public land, free from claims and rights at the date of the grant, and at the date of definite location, and was subject to and passed under the grant. Every presumption is in favor of the patent, and if under any possible circumstances consistent with the established facts, the patent could have been rightfully issued, it will be sustained.

"The doctrine as to the regularity and validity of its (the land department's) acts where it has jursidiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed."

Smelting Co. vs. Kemp, 104 *U. S.*, 636, 646.

"The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof."

United States vs. Iron Silver Mining Co., 128 *U. S.*, 673, 676.

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the land department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured."

U. S. vs. Marshall Mining Co., 129 *U. S.*, 579, 589.

And the justice of the rule laid down by these decisions is well illustrated by the case at bar. Facts consistent with the facts established not only could exist, but did exist, which rendered the issuance of the patent to the railroad company proper. It appears by the decision of the secretary of the interior, rendered November 28, 1891, in the contest referred to in Finding XVII (Transcript, p. 50), that on February 20, 1874, Flett made homestead entry of a tract of land other than that in controversy, and on June 9, 1880, made final proof therefor and received a final certificate. This decision by the secretary is not set out at length in the findings, but is reported under the title *Northern Pacific Railroad Company vs. Flett*, 13 *L. D.*, 617.

This decision and the fact there found are not referred to for the purpose of establishing the fact, but for the purpose of showing that circumstances could have existed which would have rendered it proper to issue the patent to the railroad company. And it is submitted that the patent carries the presumption that such circumstances did exist.

It is the uniform ruling of the interior department that the making of a homestead entry upon other land by one who has filed a declaratory statement operates as a relinquishment of all rights under the filing.

Neilson vs. Railroad Co., 9 *L. D.*, 402.

The same conclusion is reached by the Supreme Court of Wisconsin in *Sanborn vs. Knight*, 75 *N. W. Rep.*, 1009;

Amacker vs. Northern Pacific R. R. Co., 58 *Fed. Rep.*, 850.

III.

It is submitted further that even if the land in question was excepted from the grant to the Northern Pacific Railroad Company, the patent conveyed the legal title and concludes the rights of the parties in an action at law. By his answer the defendant set up certain facts upon which he based the claim that the patent was issued under a mistake of law, and the answer concludes with a prayer that the patent be canceled. (Transcript, p. 24.)

There can be no doubt, under the decisions of this court, that if the patent is voidable merely and not void, it conveys the legal title and is not subject to collateral attack in an action at law.

In Gibson vs. Choteau, 13 Wall. 92, 102, the court said, Mr. Justice Field delivering the opinion:

"In the federal courts, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent. But in the action of ejectment in the federal courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title."

And the court said in *Steel vs. Smelting Co.* 106 *U. S.* 447, 452:

"It is among the elementary principles of the law that in actions of ejectment the legal title must prevail. The patent of the United States passes that title. Whoever holds it must recover against those who have only unrealized hopes to obtain it, or claims which it is the exclusive province of a court of equity to enforce. However great these may be, they constitute no defense in an action at law based upon the patent. That instrument must first be got out of the way, or its enforcement enjoined, before others having mere equitable rights can gain or hold possession of the lands it covers. This is so well established, so completely embedded in the law of ejectment, that no one ought to be misled by any argument to the contrary."

Mr. Justice Grier, speaking for the court in *Greer vs. Mezes*, 24 *Howard*, 268, 277, said:

"The hybrid mixture of civil and common law pleadings introduced by the state codes cannot be transplanted into the court of the United States."

It follows, then, that unless the patent issued to the plaintiff was absolutely void it concludes the rights of the parties to this action, and the legal title conveyed by it must prevail.

The question is clearly one of the jurisdiction of the officers of the land department, who assumed to act in determining whether the particular tract of land in question passed to the railroad company under its grant.

The precise question here presented was considered by the circuit court of appeals for the Eighth Circuit in a most carefully considered opinion in the case of *United States vs. Winona & St. Peter Rail-*

road Company, 67 *Fed. Rep.*, 948. That was a suit in equity brought by the United States to cancel certifications of land made to the state of Minnesota for the benefit of the defendant company under its land grant. The lands so certified were within the place limits of the grant and upon the definite location of the road were covered by *unexpired* declaratory statements. After the filings had expired, but while they were still of record and not formally canceled, the certifications were made. Admitting that the lands were in fact excepted from the grant for the reason that they were subject to claims when the road was definitely located, the inquiry of the court was directed to the question whether the certifications were absolutely void or whether they passed the legal title and were voidable merely.

After a careful consideration of the authorities, the court deduces the following propositions:

"(1). A patent or certificate of the land department to land, over which that department has no power of disposition and no jurisdiction to determine the claims of applicants for, under the acts of congress, is absolutely void, and conveys no title whatever. Land, the title to which had passed from the government to another party before the claim on which the patent is based was initiated, land reserved from sale and disposition for military and other like purposes, land reserved by a claim under a Mexican or Spanish grant *sub judice*, and land for the disposition of which the acts of congress have made no provision, is of this character.

"*Polk vs. Wendal*, 9 *Cranch*, 87, and cases cited under it, *supra*.

"(2). A patent or certificate of the land department to land over which that department has the power of disposition and the jurisdiction to determine the claims of applicants for, under the acts of congress, is impregnable to collateral attack, whether the decision of the department is right or wrong, and it conveys the legal title to the patentee or to the party named as entitled to that title in the patent or certificate.

"*Minter vs. Crommelin*, 18 *How.*, 87-89 and cases cited under it, *supra*.

"(3). A court of equity may, in a direct proceeding for that purpose, set aside such a patent or certificate, or declare the legal title under it to be held in trust for one who has a better right to it, in cases in which the action of the land department has resulted from fraud, mistake, or erroneous views of the law."

And the court continues:

"It is not difficult to determine whether the certificates issued in this case were void or voidable when tested by these rules. Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question and to determine whether or not they are sufficient to invoke the exercise of that power. The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, not whether its conclusion in the court course of it is right or wrong.

"*Foltz vs. Railway Co.*, 8 *C. C. A.*, 635, 60 *Fed.* 316, 318, and cases cited.

"When these certificates were issued the Winona Railroad Company had undoubtedly applied to the land department for conveyances of the lands in controversy to the state for its beiefit. These lands were a part of the public lands of the United States, the disposition of which had been intrusted to that department by the acts of congress which established it and defined the powers and duties of its officers. Moreover, the acts of congress under which the Winona company claimed these lands expressly provided, as we have seen, that the secretary of the interior should indicate the lands granted under them in all cases. The conclusion is irresistible that these acts conferred the power and imposed the duty upon the officers of the land department to hear and determine the ultimate question whether or not the railroad company was entitled to these lands under its grants, and to 'indicate' the lands granted by certificates or patents to the state. In no other way could they have discharged the duties these acts imposed upon them. In deciding this question they necessarily considered whether or not the railroad company had so far complied with the acts granting the lands that it had earned them, the character of the lands themselves, and the class to which they belonged, the time of the definite location of the line of the railroad, the homestead entries and pre-emption filings that were then upon the lands, the cancellation of all these entries and filings that had been made and finally the legal effect of all these all other material facts upon the claim of the railroad company to receive the lands under the acts of congress. It now appears that they were mistaken as to the legal effect of these facts, but the question they decided was one which the acts of congress authorized and required them to decide,—one which they were obliged to decide before they issued the certificates; and, although their decision and their conveyances evidenced by these certificates may be voidable, they are not absolutely void. They are impregnable to collateral attack, and they conveyed the legal title to the lands to the state and its grantees."

This case came on appeal to this court, but the question of the void or voidable character of the certifications was not directly passed upon.

United States vs. Winona & St. Peter R. Co., 165 *U. S.* 463.

The presumption always and necessarily exists that the officer issuing a patent had jurisdiction so to do.

Smelting Co. vs. Kemp, 104 *U. S.*, 646.
Polk's Lessees vs. Wendell, 5 *Wheat.*, 304.
Bank of U. S. vs. Dandridge, 12 *Wheat.*, 69-70.
Bagnell vs. Broderick, 13 *Pet.*, 450.
Field vs. Seabury, 19 *How.*, 323, 332.
Hughes vs. U. S., 4 *Wall.*, 232, 236.
Jackson vs. Lawton, 10 *John*, 213.
Delassus vs. U. S., 9 *Peters*, 134.
Minter vs. Crommelin, 18 *How.*, 87, 88.
Clements vs. Macheboeuf, 92 *U. S.*, 425.
Maxwell Land Grant Case., 121 *U. S.*, 379-382.
Colorado Coal Co. vs. U. S., 123 *U. S.*, 316, *et seq.*
Jackson vs. Cole, 4 *Cowen*, 596-7.
U. S. vs. Budd, 144 *U. S.*, 154, 161, *et seq.*

We submit that the judgment of the court below should be reversed.

C. W. BUNN AND
JAMES B. KERR,
Counsel for Plaintiff in Error.

(16,655)

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 154.

THE NORTHERN PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

JAMES DE LACEY,
DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

Comes now James DeLacy, the Defendant in Error, by his attorneys, Ballard & Norris, and W. H. Pritchard, Esq., of counsel, and calls attention of this Honorable Court to the questions involved in this proceeding in error.

First.

As to the issues made in the pleadings; this cause originally was a simple suit in ejectment, under the laws of the State of Washington, in the Circuit Court of the United States, 9th Circuit, holding terms at Tacoma, Washington, commenced by the plaintiff in error, the plaintiff below, to recover possession of the following lands, to-wit:

The Southwest quarter of Northeast quarter; the Southeast quarter of Northwest quarter, and east half of the Southwest quarter, Section 21, Township 20 North, Range 3 Willamette Meridian, in the State of Washington.

Under an allegation of ownership from James De Lacey, the defendant in error, who was in possession, claiming homestead rights thereto, under the Homestead Law of the United States; no claim for damages. See Record, page 1.

To said complaint the defendant in error filed answer. See Record, page 4.

And denies ownership in the plaintiff, setting up the facts showing his right of possession.

To this answer the plaintiff filed motion to strike. See Record, page 12.

On argument and submission, Hon. C. H. Hanford, presiding Judge, overruled said motion in part, and defendant in error filed an amended answer.

To this amended answer plaintiff filed demurrer. See Record, page 25.

On argument and submission, Hon. C. H. Hanford, presiding Judge, overruled said demurrer. See Record, page 26.

Thereupon, the plaintiff filed a reply to said answer, joining issue on the facts, see Record, page 27, and the issue thus presented was set down for trial.

Afterwards, to-wit, on the 10th day of July, 1894, said cause was tried before Honorable W. B. Gilbert, Judge of said Court, presiding, and by written stipulation a jury was waived and trial had to the Court. See Record, pages 29 and 30.

That afterwards, on the 13th day of September, 1894, there was filed in said cause the opinion of the

Hon. W. B. Gilbert, Judge of said Court. See Record, page 30.

That afterwards, on the 6th day of October, 1894, the Honorable Trial Court made and filed in Court a full and complete finding of facts. See Record, page 36.

On the same day the Honorable Trial Court made and filed his conclusions of law. See Record, page 41.

Thereupon the defendant filed his motion to set aside the finding of facts, conclusions of law and judgment, see Record, page 42, and on November 28, 1894, said Court overruled said motion for new trial, and entered final judgment. See Record, page 45.

Thereupon, and within six months from the entering of said judgment, the defendant appealed said cause to the Honorable United States Circuit Court of Appeals, Ninth Circuit, holding terms at San Francisco, California, which appeal was argued and submitted at the October term, 1895, of said Appellate Court.

Afterwards, to-wit, on the 6th day of February, 1896, said Court filed in said cause the opinion of said Court, and judgment reversing the Trial Court, settling every issue in the case, directing further proceedings not inconsistent with the said opinion and mandate filed in said U. S. Circuit Court, February 25, 1896. See Record, page 46. Said cause fully reported in Vol. 72, Fed. Rep., page 726.

From said judgment of said Honorable Circuit Court of Appeals, no appeal, writ of error or review was taken, to this Honorable Court, notwithstanding provision is made for such proceeding in section 6 of the act creating the Circuit Court of Appeals; see Act of Congress, Vol. 1, Supplement to Revised Statutes of the United States, pages 901-904, and more than one

year has elapsed since the entering of said judgment, and the filing of said opinion, February 6, 1896.

That subsequent to the entry of said judgment, under the rules of said Court, the mandate of said Court issued to the Honorable Trial Court for further proceedings, not inconsistent with the opinion filed; and on motion of defendant, with due notice to the plaintiffs, and on the 28th day of May, 1896, the Honorable Trial Court, against the verbal protest of the plaintiff, entered judgment in strict compliance to the said mandate. See Record, page 50.

From the overruling of plaintiff's verbal protest, and the entering of the final judgment by said Trial Court, the plaintiff excepted. See Bill of Exceptions, Record, page 52, as follows:

1st. "That said plaintiffs were, under the mandate of said U. S. Circuit Court of Appeals, entitled to a new trial in said action for the purpose of showing the facts necessary to establish that the Northern Pacific Railway Company had good title in fee to the land described in the complaint."

2d. "That the judgment which was presented to the court for signature, together with said motion, was in part a decree in equity, in that it decreed that the patent issued to the Northern Pacific Railway Company for the land described in the complaint herein, which said patent is dated December 13, 1892, is null and void."

Subsequently the plaintiff took a second appeal, or writ of error, to the United States Circuit Court of Appeals, Ninth Circuit, and made and filed an assignment of errors, as follows: See Record, page 54.

1st. "The said court overruled plaintiff's demur-

rer to the affirmative defense in the defendant's answer herein."

This assignment of error was frivolous and for delay only, no such question was before the court at the time, no such question was presented to the court, nor passed on by the court, and no bill of exceptions taken and signed by the court, covering any such proposition. In fact the said demurrer was overruled February 12, 1894, see Record, page 26, and plaintiff waived the demurrer, filed reply, joined issue on the facts, and went to trial, and the question of overruling said demurrer was not presented nor insisted upon on the first appeal, and it comes too late now.

We cite:

U. S. vs. Blackfeather, Vol. 15, Sup. Ct. Rep., 63.

Second error assigned: "The said court refused to order a new trial and entered judgment without the intervention of a jury, upon the defendant's motion."

This assigned error is based on the first exception. See bill of exceptions; and is frivolous, because no motion was ever made and filed for new trial, as set out in the bill of exceptions, and for the reason, if motion had been filed for a new trial the matter would be in the discretion of the court, and the overruling of same would not be an assignable error.

We cite in connection:

Van Stone vs. Stilwell, 12 Sup. Ct. Rep., 181.
Hickman vs. Fort Scott, 12 Sup. Ct. Rep., 9.
Holder vs. U. S., 14 Sup. Ct. Rep., 10.
Moore vs. U. S., 14 Sup. Ct. Rep., 26.
Latta Exr. vs. Granger, 17 Sup. Ct. Rep., 746.

Third error assigned: "The said judgment grants to the defendant equitable relief, in that it decrees that the patent issued to the said Northern Pacific Railway Company for the land described in the complaint herein, which said patent is dated December 13, 1892, is null and void."

This error assigned is based on the second cause mentioned in the bill of exceptions. See Record, page 53. That exception was not taken to the judgment as entered by the court, but says to, "the judgment which was presented to the court for signature, together with said motion." See Record, page 53. No exception was taken to the judgment entered by the court, at least, there was no bill of exceptions showing it.

This error assigned is frivolous for the reason, no relief in equity, or otherwise was granted the defendant, see Record, page 51; simply a judgment at law declaring the patent void because issued without authority of law; and in favor of the defendant for costs.

The law of the case was determined by the Honorable Circuit Court of Appeals. See Record, page 46. Also see case fully reported in 72 Fed. Rep., page 726. No appeal, writ of error or review was taken from that judgment, and that opinion remains the law of this case. The judgment is strictly in accordance with the opinion and mandate, no other could have been entered, and as we believe is sustained by former opinions of this honorable Court.

We cite:

Van Wyck vs. Knevals, 1st Sup. Ct. Rep., 336.

Railway Co. vs. Dunmeyer, 113 U. S., 629. (5th Sup. Ct. Rep., 566).

Bardon vs. Railroad Co., 145 U. S., 535. (12th Sup. Ct. Rep., 856).

Land Co. vs. Griffey, 143 U. S., 32. (12th Sup. Ct. Rep., 362).

Fourth error assigned: "The court failed and refused to hold that the patent of the United States issued to the plaintiff December 13, 1892, conveyed to said plaintiff the legal title to the land in controversy, and that plaintiffs are entitled to recover in this action."

This error assigned is not saved by any bill of exceptions; no such proposition was submitted to, or passed on by the trial court at that time; and it is frivolous in view of the opinion and mandate of the appellate court, where the findings of fact were considered, and the law determined adverse to the plaintiff. It must be frivolous to assign such an error in this cause and insist upon it in this Court.

Fifth error assigned: "The court entered a judgment not sustained by the findings of fact."

No such question was at that time before the court. The appellate court passed on that proposition on the first appeal, and under the mandate the trial court could enter no other judgment; no such question was presented, and no bill of exceptions taken or signed, saving such question.

Sixth error assigned: "The said court failed and declined to hold that the Northern Pacific Railway Company is the owner of, and that plaintiffs are entitled to the possession of the land in controversy."

The trial court so held on the trial. On defendant's appeal, the honorable United States Circuit Court of Appeals reversed that judgment, and it was not error for the trial court under the mandate to *decline to so*

hold. And it is frivolous to assign such error. On the re-appeal of said cause by this plaintiff in error, the honorable appellate court, with bill of exceptions and the errors assigned as aforesaid before it, affirmed the judgment, and, we think, committed no error. The appellate court filed no opinion and we see nothing left for this Honorable Court but to affirm the judgment of the appellate court, from which this proceeding in error comes.

The lower court, under the mandate had nothing to do except enter the judgment in accord with the mandate, and having so entered the judgment, no appeal would lie.

We cite:

Ex parte, Washington & G. R. Co., 11 Sup. Ct. Rep., 673.
Gaines vs. Caldwell, Judge, 13 Sup. Ct. Rep., 611.
Cook vs. Bumley, 11 Wall, 677.
Stewart vs. Salmon, 97 U. S., 361.
Humphrey vs. Baker, 103 U. S., 736.
Kantz vs. Rio Grande R. R., 32 L. A. R., 826.

On a re-appeal or second appeal, the only matter that could be brought, or that was properly before the appellate court for review, was the proceeding of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question of law or fact before the court, by previous appeal.

We cite:

Balch vs. Hass, C. C. A., 8 Circuit, reported in 73 Fed. Report, 974.

We take it the practice in this Honorable Court will be substantially the same. If the appellate court committed no error in affirming the judgment under the mandate, then this Court will affirm that judgment.

The Honorable Court, please, we understand the practice in this Court to be that this Court can only be called upon to consider such assigned errors as were pressed upon the attention or notice in the opinion of the court below. And we cite the recent case, October 27, 1896, of "Old Jordan Mining and Milling Co. vs. Socite Anonyme De Mines De Lexington, 164 U.S., 261.

Where the court says, see opinion: "We have repeatedly held that the failure to present and insist upon errors assigned in the court below, constitutes an abandonment or waiver of all errors, so assigned, not vital to the question of jurisdiction or the foundation of the right; and this court can only be called upon to consider the errors pressed upon the attention or notice in the opinion of the court below."

Cited:

Montana R. Co. vs. Warren, 137 U. S., 351.

San Pedro Acda Co. vs. U. S., 146 U. S., 136.

All the questions that could be presented to the Honorable Circuit Court of Appeals, on the re-appeal from which judgment this error comes, is the question saved and presented by the bill of exception. See Record, pages 52, 54.

And the only question thus presented is:

First. The question of overruling protest, and failure to grant new trial, that being a question not reviewable, not assignable as error, and not being reviewable in appellate court, it will not be reviewed by this Court.

The only other question saved by this bill of exception and presented to the appellate court (see Record, page 53) is—

Second. That covers a "judgment presented to the court for signature together with said motion," and not any judgment entered by the court; and as the appellate court did not consider the same, and there being nothing in the Record to show that it was insisted upon, and there being no opinion filed showing what matter was presented or insisted upon, other than this defendant's motion to dismiss, and the honorable court simply overruled said motion and affirmed said judgment, we see nothing for this Honorable Court to review.

If the errors that the plaintiff in error complains of were committed it was done by the Honorable United States Circuit Court of Appeals in the opinion and judgment on first appeal, which opinion and judgment was FILED ON THE 6TH DAY OF FEBRUARY, 1896.

No motion was made in that court for review; no appeal, writ of error or review was taken within one year as provided by law, and not at all to this Honorable Court, and under the rule announced in case cited supra "Old Jordan Mining Co.," 164 U. S., 261, we take it this constitutes an "abandonment or waiver of all errors," and the judgment of the Honorable Circuit Court of Appeals must stand as the law of this case, and should be affirmed by this Court.

This Honorable Court, please, we will call attention to the merits of this controversy, so that it will be known that we are not stickling for technical advantage, but have real merits in our contention; and will say in advance, that in our opinion every question af-

fecting the claim of the plaintiff to the land in controversy has been fully determined by the previous opinion and judgment of this Honorable Court.

FIRST, PLEADING.

In the defendant's answer, see 6th paragraph, Record, page 22, the defendant avers "that the map of definite location, general route of main line of said plaintiff railroad was filed July 30, 1870, and an order of withdrawal issued by the land department of the United States as provided in said grant, on August 13, 1870, at which time the pre-emption filing of said John Flett, D. S. 1227 aforesaid, was a valid pre-emption filing upon said land as hereinbefore described, as shown by the records, books and plats of the General Land Office of the United States, to which books, records and plats reference is here made, and said pre-emption filing aforesaid was then legal, valid, uncancelled pre-emption claim to said land, and defendant avers such filing and claim excepted said land from the operation of said grant."

The plaintiff filed a reply to that paragraph of said answer, as follows: "Denies the same, except the allegation in said paragraph that the map of general route of plaintiff's main line of railroad was filed on July 30, 1870, and that an order of withdrawal was issued by the land department of the United States, on August 13, 1870, as provided in the grant to plaintiff as alleged in said paragraph, which allegation said plaintiff admits. See Record, page 28.

In the 7th paragraph of plaintiff's reply the plaintiff avers "said plaintiff admits that the lands in controversy are within the limits of the grant to plaintiff on

main line of plaintiff's railroad as definitely located and fixed under and by virtue of the act of Congress of July 2, 1864, and the acts amendatory thereof, and said plaintiff admits that the defendant is in possession of said lands. See Record, page 28.

Thus the averment of the answer and the admission in the reply thereto, fixes the definite time when the map of route and withdrawal under the grant took effect, and the further fact that the land in controversy is within the limits of the grant, and withdrawal on main line of plaintiff's railroad via the valley of the Columbia river to Puget Sound, that being the main line so fixed by the amendatory act of May 31, 1870, cited Vol. 16, supplement to the revised United States Statute, pages 378 and 379. The issue thus fixed and settled in the pleadings, was the issue and only issue before the trial court on that subject, and to that issue so made in the pleadings the testimony of the plaintiff and the defendant was introduced. The plaintiff introduced the patent dated December 13, 1892, for the land in controversy, and this patent recites the fact that it is issued in pursuance to the act of July 2, 1864, as amended by act, May 31, 1870, on the main line via the valley of the Columbia river to Puget Sound. There was no averment in the pleadings that the land was within the limits of any other grant, or on any other main or branch line of plaintiff's railroad.

In this connection we will call attention to the law of Congress under which the plaintiff must recover, if at all. Under the original grant, July 2, 1864, plaintiff was granted every alternate odd numbered section of land for 20 miles on each side of the main and branch line of railroad, substantially from Duluth to Puget Sound, across the then territory of Washington, the

main line to Puget Sound and a branch line from some point on main line to a point at or near Portland, Oregon, to which a homestead or pre-emption claim had not attached at the time of the filing a plat or map of the survey of such line, in the land department. So that, under the original grant and the allegations and admissions of the pleadings, said grant attached to the lands in controversy on July 30, 1870, at least on August 13, 1870, when the withdrawal was issued as provided in the act, unless at that date the land was covered by the John Flett D. S. 1227, and the record at that time shows it to be uncancelled. And if at that time, August 13, 1870, the record in the land office showed this John Flett pre-emption uncancelled, that settled the question, and under the terms of the grant this land was excluded from the grant, and said company was entitled to select other land in lieu thereof.

The honorable trial court in the 4th finding, see Record. page 38, finds that the map on the main line was filed July 30, 1870, and order of withdrawal issued August 13, 1870.

The honorable trial court found in his 12th finding that on April 9, 1869, John Flett filed his D. S. 1227, declaring his intention to purchase the land in controversy. See Record, page 39.

In his 13th finding, see Record, page 40, found that in September, 1870, Flett went to the land office to make final proof. And in the 19th finding, see Record, page 41, the court finds that "Flett's declaratory statement was not formally cancelled upon the record until December 23, 1891." The law is: "That the cancellation of the entry takes effect as of the date when the decision was in fact rendered."

And we cite:

Henderson vs. N. P. R. Co., 7 L. D., 163, opinion of Hon. Secretary of the Interior, Vilas.

These facts, with the law laid down by this Court in the Dunmeyer case should have settled this case against plaintiff in the trial court. But not so. See Kansas Pacific Ry. Co. vs. Dunmeyer, 5 Sup. Ct. Rep., 566, supra.

Subsequent to April 9, 1869, Congress (at the request of plaintiff company) passed a joint resolution, No. 20, "Extending its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound to be determined by the said company."

Later Congress passed Resolution No. 67, "And also to locate and construct, under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget Sound via the Columbia river; with right to locate and construct its branch from some convenient point on its main trunk line, across the Cascade mountains to Puget Sound." Resolution approved May 31, 1870. See U. S. Statutes at Large, Vol. 16, page 378, 379. This act was passed one year and twenty-two days subsequent to the John Flett pre-emption on the land in controversy.

This resolution reserves from the grant all lands in any manner disposed of by the government subsequent to the grant of July 1, 1864.

The plaintiff company accepted this new grant, and under it surveyed and platted its main and branch lines, and completed said road on main and branch lines prior to January 1, 1885.

By this joint resolution, Congress in effect repealed the original grant of 1864, so far as it applied to land within the territory of Washington, or substituted a new grant for the territory of Washington. For the first time plaintiff was by law authorized to build the main trunk line via the valley of the Columbia river to Puget Sound; and for the first time had the right given said company to establish and construct its branch line across the Cascade mountains to Puget Sound.

We cite:

United States vs. Northern Pacific R. Co., 152 U. S., 284 (14 Sup. Ct. Rep., 598),

Where this Honorable Court says:

"For the first time by joint resolution of May 31, 1870, whereby it is authorized with all the privileges and grants of the original act; to locate and construct its branch line to some point on its main line across the Cascade mountains to Puget Sound."

And we might add, for the first time took any interest in government lands on the main trunk line, and the Cascade or branch line in the now State of Washington, and that all land in the State of Washington to which a homestead or pre-emption claim had attached May 31, 1870, was excluded from the grant; and this John Flett D. S. 1227, April 9, 1869, being of record in the land office on May 31, 1870, was excluded from the grant, and by the terms of the grant plaintiff company at once became entitled to select other lands in lieu thereof.

We cite:

Railway Co. vs. Dunmeyer, 113 U. S., 629.
Bardon vs. Railroad, 145 U. S., 535.
Land Co. vs. Griffey, 143 U. S., 32.

The Honorable Court, please, we now call attention to the findings of facts of the honorable trial court.

First, Finding No. 4, Record, page 38; map of definite location filed in the General Land Office, August 13, 1870.

Finding No. 12, Record, page 39; John Flett filed D. S. 1227, covering the land in controversy, April 9, 1869.

Finding No. 13, Record, page 40, where the court is inclined to raise a doubt as to John Flett being a legal pre-emptor. As to this, we say this question can not be raided or urged by the railroad company in aid of the grant. And this is so well settled in this court, we need not cite authorities.

The land department recognized John Flett as a legal pre-emptor, and the honorable trial court in his opinion in this case, 66 Fed. Rep., on page 451, says: "And if the title in controversy in this suit were to be determined by the rights which the company acquire under the joint resolution, only, the decision must be for the defendant, for it is clear that at, and prior to the date of the joint resolution, there was upon file in the local land office a valid and subsisting pre-emption entry, being unforfeited and uncancelled, operated to except the land from the grant."

The fifth, sixth, seventh, eighth, ninth, tenth and eleventh findings, see Record, page 38, are immaterial under the pleadings and other facts of this case. Immaterial for the reason that at and during all the time when subsequent maps of location were filed, they were subsequent to the original map of definite location, July 30, 1870.

See 4th finding, Record, page 38. The land in controversy was covered by the John Flett pre-emp-

tion D. S. 1227, and being contested as found by the trial court, see findings, 12, 13, 16 and 17, and Record, pages 39, 40. And the honorable trial court found as a fact material under the pleadings, that the Flett declaratory statement was not formally cancelled upon the records until December 23, 1891; see Record, page 41. And under the decision of this Honorable Court in Whitney vs. Taylor, 158 U. S., 85, we assume that this has settled every material question in this case adversely to the claim of the plaintiff herein. We rely upon that decision of this Court as fixing the law of this case, and it is in harmony with all former opinions of this Court, and we can only wonder that counsel for plaintiff in error (the N. P. Ry. Co.) so continually and persistently contest the rights of this an honest homesteader before this Honorable Court.

This Honorable Court has repeatedly held that a railroad company claiming a land grant can not do these things; can not contest the rights of a homestead or pre-emption claimant. So often have these questions been before this Honorable Court that counsel for defendant in error feel like apoligizing to this Court for presenting an argument as to the matters brought by this proceeding in error.

We might cite from the decisions of the land department to show that the land department of the government is in harmony with the Court.

We cite:

Milligan vs. N. P. R. R. Co., 7 L. D., 85.

Where the Honorable Secretary of the Interior says:

"A pre-emption filing of record which has attached at the date of withdrawal on general route, and when the line was definitely fixed, excepts the land covered

thereby from the operation of the grant, and the railroad company can not question the validity of such filing."

We cite also:

7 L. D., pages 14, 85, 131, 238, 352.
10 L. D., 246, 288, 386, 427, 645, 662, 307.
All of these N. P. R. R. cases.

We cite:

Michael Orr vs. C. P. R. R. Co., March 20, 1891, Vol. —, L. D., page —.

In that case the land was within the limits of the grant to the railroad company. Pre-emption filed June 15, 1856, by W. B. Wilson. After definite location of the line of the railroad, January 25, 1877, Orr made application to file homestead entry, and the same was rejected, the railroad company contesting. Orr claimed that the filing excluded the land from the grant, and Wilson's right being forfeited by his failure to make proof, Orr's application should be allowed to stand for the land. This cause is on all-fours with the case at bar. On appeal to the Honorable Secretary of the Interior, the Hon. John W. Noble, he says:

"The pre-emption of Wilson being a valid claim subsisting at the date of definite location excepted the tract from the operation of the grant, and the application of Orr was, therefore, erroneously rejected."

There are other questions that we desire to call the attention of this Honorable Court to:

First. We call attention to the proposition of the honorable trial court, that while the land in controversy was excluded by operation of law from the grant of 1864, as amended by resolution of May 31, 1870, never-

theless, the grant on the branch line of 1864 covered the land and attached to it by reason of the filing of the map of the line from Tacoma to South Prairie in 1884. See tenth finding, Record, page 39. And carried the title to this land to the plaintiff company, notwithstanding the issues in the pleadings and admissions of the plaintiff in their reply. See paragraphs 6 and 7, Record, page 28.

And notwithstanding the recitals in the patent, and notwithstanding the opinions of this Honorable Court in the cases heretofore cited.

While we say the honorable trial court, to reach that determination, went outside of any pleading, outside of any issue in the case made by the pleadings, and so found.

We cite, and call attention to the opinion of the honorable trial court in this cause, 66 Fed. Rep., 450. At page 451 the court says: "And if the title in controversy in this suit were to be determined by the right which the railroad company acquired under the joint resolution only, the decision must be for the defendant, for it is clear that at, and prior, to the date of the joint resolution, there was upon file in the local land office a valid and subsisting pre-emption upon the land in controversy, which entry being unforfeited and uncancelled operated to except the land from the grant."

And the court cites:

R. R. Co. vs. Dunmeyer, 113 U. S., 629.
Bardon vs. R. R. Co., 146 U. S., 535.
Land Co. vs. Griffey, 143 U. S., 32.

And the honorable trial court in his 19th finding, see Record, page 41, found Flett's declaratory state-

ment was not formally cancelled upon the record until December 23, 1891.

Defendant's counsel in arguing his motion for a new trial in the court below, insisted that on the main line, under the resolution of May 31, 1870, this land was excluded from the grant of 1864, as amended May 31, 1870, just as the court determined, and asked to be informed how, when, and by what authority the same was subsequently restored, or returned to the grant, so as to make it effective, and convey the title to the land on filing the map on branch line in 1884, fourteen years after it was excluded from the grant. That has never been answered to the satisfaction of the counsel for defendant by the honorable court.

Not yet content, the honorable court in his opinion, same page, says: "If there was no information before the court concerning the pre-emption claim other than the entry in the land office a different case would be presented; but the defendant alleges in his answer, abandonment of the land by Flett in 1871 and a forfeiture of all his rights under the pre-emption entry." (See opinion, page 453, 66 Fed.) "But here it is not only admitted by both the parties to the action that Flett abandoned and forfeited his claim in 1871, but the very right of the defendant to possess and claim the land is predicated upon such abandonment by Flett, and the extinction of Flett's claim. Such an admission must be held to destroy the effect and force of the entry in the land office."

Will the Honorable Court pardon the writer of this brief for smiling? He has been in the practice of law since 1858, and for the first time learned that at law, the admission of James DeLacey in this suit, to which neither the United States nor John Flett were parties, made

in court in the State of Washington in 1893, and assented to by the attorney for the Northern Pacific Railroad Company, has the "force and effect of destroying the entry in the land office." Plaintiff and defendant have been contesting the Flett pre-emption claim persistently since 1886, and this admission in the pleadings could not have the force and effect to destroy this entry in the land office.

Under the law and the records in the local and general land offices, plaintiff could never get the land, for the reason that from the facts as they exist in truth, and as found by the honorable trial court, the land was excluded from the grant, and the plaintiff was entitled to select other lands in lieu thereof.

But way down in 1892-3, DeLacey, in the suit of the Northern Pacific Railroad Co. against him for the possession of the land, avers that John Flett had forfeited all his rights under the pre-emption in 1871, and said company, the other contestant, admits the averment. Ergo, change: The railroad company gets the land, and the homesteader, James DeLacey, loses all his labor and valuable improvements made on the land since 1886, and the land as well, which land the trial court found to be of the value of $100,000.00. Had DeLacey employed some attorney instead of Ballard, one who had sufficient experience and knowledge of the law not to make such an admission, then this plaintiff could not have admitted the plea, and the records of the land office would stand, and the company lose the land. How uncertain is law. We are almost ready to say, as did the Honorable Circuit Court of Appeals, in this case on the first appeal: "We think this a mistaken quantity." See 72 Fed. Rep., 726.

Your Honors, please, the attorney who drew the original and amended answer herein, desires to call attention to the pleading and show that the admission found by the trial court, and on which his remarkable judgment was based (see opinion cited supra 66 Fed. Rep., 450) was not true in fact; no such admission was made. See paragraph 4 of amended answer, Record, page 22: "That said John Flett never having made final proof under said D. S. 1227, and never having resided upon or improved said land since 1871, forfeited all his right to make such final proof as required by law, and said pre-emption filing remained upon the records, books and plats of the General Land Office of the United States from said April 9, 1869, pending contest in local and general land offices of the United States until December 23, 1891, when the same was cancelled in fact and of record. All of which appears in the records of the General Land Office at Washington, D. C., and to which records reference is here made."

The honorable trial court should be fair in his findings.

On the re-appeal or second appeal of this cause by the plaintiff in error from the judgment entered under the mandate of the Circuit Court of Appeals, 9th circuit, the defendant in error filed his motion to dismiss the second appeal, because frivolous, and for delay; and we still think the motion should have been sustained. The motion was overruled and judgment affirmed February 8, 1896. We then thought and so argued that the judgment of said Honorable Circuit Court of Appeals rendered on February 6, 1896, reversing the trial court, was a determination of all the questions involved in the suit, and that all the plaint-

iff's rights had been adjudicated as shown by that opinion, and was a proper judgment and the final judgment from which an appeal, writ of error or review would lie to this Honorable Court. If anything was left to be done by the honorable trial court, except put the judgment in form and enforce it, then we are wrong. Otherwise the judgment of the said appellate court became the law of this case until that judgment was taken to this Court by appeal, error or review, and such an appeal must be taken in one (1) year from the filing of said opinion and entering judgment.

We cite:

T. P. R. R. Co. vs. May Gentry, 163 U. S., page 353, (16 Sup. Ct. Rep., 1104).

Bostwick vs. Brinkerhorf, 1 Sup. Ct. Rep., 15.

"Express Companies' Cases," 2 Sup. Ct. Rep., page 6.

St. Louis I. M. & S. Co. vs. Southern Ex. Co., 2 Sup. Ct. Rep., 6.

Lodge vs. Tweel, 135 U. S., 232 (10 Sup. Ct. Rep., 745).

McSourkey vs. R. R. Co., 146 U. S., 536 (13 Sup. Ct. Rep., 170).

In this last case cited the question is fully stated and confirms our view of the law.

We took no exception to the overruling of our motion, the court affirmed the judgment. We say now if the rights of the parties were determined in that opinion, and the judgment was entered according to the mandate, then the only question before the honorable appellate court on the second appeal, or error, was such questions as arose subsequent to the mandate;

and these questions only will be heard on this proceeding in error from the judgment of affirmance.

The Court will not re-examine anything that has been decided in a former appeal.

We cite:

Supervisors vs. Kennicutt, 94 U. S., 498, where the court (Chief Justice Waite) says: "For it is settled in this court that whatever has been decided here upon one appeal can not be re-examined in a subsequent appeal of same suit; such subsequent appeal brings up for consideration only the proceedings of the Circuit Court after the mandate."

Citing:

Martin vs. Hunter, 1 Wheat, 314.
Himley vs. Rose, 5 Cranch, 314.
Browder vs. McArthur, 7 Wheat, 58.
Sibbald vs. U. S., 12 Peters, 492.
Corning vs. Troy Iron Fac., 15 Howard, 466.
Sizer vs. Many, 16 Howard, 103.
Tyler vs. Maguire, 84 U. S., 15, 973.
In St. Bo. Lady Pike, 96 U. S., 461.

We insist that there is no error properly before this Court for review, touching any matter passed upon by the appellate court, for the reason that said appellate court passed upon the facts found by the trial court and determined the law, reversing the judgment, thus settling every question of law adversely to the plaintiff.

From that determination a right of review by this Honorable Court is provided for, as a legal right under Sec. 6 of the law of 1891, see Vol. 1, Supplement to Rev. Stats., page 903-4, and a failure to avail themselves of

that legal right, by the plaintiff, within one year from that determination must be a waiver or an abandonment of that right; and that judgment and opinion must stand as the law of this case, and no appeal will lie from the entry of the judgment under the mandate.

Aspen Min. & S. Co. vs. Billings, 14 Sup. Ct. Rep., 4.

Where the court says: "And no rule is better settled than that an appeal from a decree entered by the court below in accordance with the mandate of the appellate court can not be maintained."

Citing:

Stewart vs. Salmon, 97 U, S., 361.
Humphrey vs. Baker, 103 U. S., 736.
Railway Co. vs. Anderson, 147 U. S., 237.

If the Circuit Court of Appeals erred the appropriate remedy lay in certiorari.

Cite:

Amer. Con. Co. vs. Jacksonville Ry. Co., 13 Sup. Ct. Rep., 758.

Where the court says, that an appeal, writ of error or review is given as a right in cases not made final in C. C. A.

Notwithstanding this, the plaintiff in error now sues out a writ of error from this Honorable Court to the appellate court, from the judgment of affirmance of the judgment of the trial court under the mandate; and insists on this Honorable Court reviewing the whole case. If that can be, or will be done, then we mistake the purpose of the act creating the Circuit Court of Appeals.

We cite:

Ex parte Washington & G. R. R., 11 Sup. Ct. Rep., 673.

Gains et al vs. Caldwell, Judge, 13 Sup. Ct. Rep., 611.

Cone vs. Bumley, 11 Wall, 677.

Kantz vs. Rio Grand R. R. Co., 32 L. A. R., 826, Vol. —, U. S. Rep.

Your Honors, please, one of the questions contended for by plaintiff in error on the demurrer at the trial and in the appellate court was that the patent having issued, it was conclusive, that the validity or legality of the patent could not be questioned or attacked in this proceeding. We think the honorable trial court did not err in this regard.

We cite:

Burfening vs. St. P. M. & O. R. R. Co., 163 U. S., 321 (16 Sup. Ct. Rep., 1018).

Citing:

Johnson vs. Towsley, 80 U. S., 13.

St. Louis Smelt. & Ref. Co. vs. Kemp, 104 U. S., 636.

Steel vs. St. Louis Smelt. & Ref. Co., 106 U. S., 447.

Wright vs. Roseburry, 121 U. S., 488.

McCormide vs. Hayes, 159 U. S., 332.

And the court says: "But it is equally true that when by act of Congress a tract of land has been reserved from homestead and pre-emption or dedicated to any special purpose, proceeding in the land department in defiance of such reservation or dedication, although, culminating in a patent, transfers no title and may be challenged in an action at law."

We cite in addition:

Doolan vs. Carr, 125 U. S., 618.

Where the court says: "The decisions of this court on this subject are so full and decisive that a reference to a few of them is all that is necessary."

Cites:

Poke vs. Wendall, 9th Cranch, 87.
New Orleans vs. U. S., 10 Peters, 730.
Wilcox vs. Jackson, 13 Peters, 509.
Stoddard vs. Chambers, 2d How., 317.
Easton vs. Salisbury, 21 How., 428.
Reichart vs. Felps, 6 Wall., 160.
Bast vs. Polk, 18 Wall., 117.
Railroad vs. U. S., 92 U. S., 733.
Newhall vs. Sanger, 92 U. S., 209.
Smelting Co. vs. Kemp, 104 U. S., 636.
Steel vs. Smelting Co., 106 U. S., 447.
Railroad vs. Dunmeyer, 113 U. S. 642.
Reynolds vs. Mining Co., 116 U. S., 689.
Davis vs. Wiebold, 139 U. S., 507.
Knight vs. U. S. Ass'n, 142 U. S., 161.
Morton vs. Nebraska, 88 Wall., 660.

The Honorable Court, please, this is not a case in ejectment at common law, but a case in ejectment or special proceedings in the nature of ejectment under section 531 of the law of the State of Washington. See Hill's Code of Washington, Vol. 2, page 287, as follows: 531. "The plaintiff in such actions should set forth in his complaint the nature of his estate, claim or title to the property and the defendant may set up a legal or equitable defence to plaintiff's claim."

The plaintiff alleged ownership and introduced his patent to prove legal title, and made no other claim to the land, and must stand or fall by that title.

The defendant is in possession, under his claim to the land under the homestead law, being a resident thereon with valuable improvements; see 15th finding, Record, page 40, and his right must be determined by the land department. See also 20th and 21st findings, Record, page 41; the trial court found the value of the land to be $100,000. See 21st finding, supra.

The Honorable Court will find the land to have been U. S. Government land April, 1869; that John Flett made pre-emption filing thereon April 9, 1869, D. S. 1227; that same remained of record under contest in the land department of the Government until December 23, 1891, when the same was cancelled by the only authority in this Government that could do so, the land department.

That the map of general route was filed July 30, 1870, and withdrawal issued by the land department August 13, 1870. And the map of definite route on branch line from Tacoma to South Prairie, on Cascade branch line, filed March 26, 1884, and said branch line was completed April 23, 1884, the land having been withdrawn in 1870, which fixed the time when plaintiff's interest under the grant was determined; no withdrawal was made by the land department on filing this map of branch line; with these facts and the law as laid down in the case of Whitney vs. Taylor, cited supra, 15th Sup. Ct. Rep., page 796, we certainly insist that the Honorable Circuit Court of Appeals was right in reversing the trial court, and in affirming the judgment of the trial court under the mandate on the second appeal; that the land in controversy is not and was

not conveyed by the grant to plaintiff company, and that plaintiff took no title thereto under the grant, and the patent issued December 13, 1892, to plaintiff void, and when the honorable court, under the direction of the mandate, entered the judgment declaring the patent void, the court committed no error.

We cite:

Hastings & D. R. Co. vs. Whitney, Vol. 10, Sup. Ct. Rep., 112.

Sioux City & I. F. T. & L. Co. vs. Griffey, 12 Sup. Ct. Rep., 362.

Dunmeyer case, 113 U. S., 629.

Bardon case, 145 U. S., 535.

Land Co. vs. Griffey, 143 U. S., 32.

Whitney vs. Taylor, 15 Sup. Ct. Rep., 796.

The Honorable Court, please, we are almost led to exclaim, "how long, oh, how long" will the courts of the country permit this rich railway corporation, who has received from the government a munificent bounty in land, worth many millions of money, be permitted to contest this homestead claimant in his efforts to get a home upon the public domain, and to prosecute this unfounded claim to the land in controversy, driving the claimant to the verge of bankruptcy, in the face of the facts and law, and in face of the fact that this railway company has no right in law to make contest of these homestead or pre-emption claims?

In the Whitney-Taylor case, also in former cases, this Court has informed the railway company on the subject. In that opinion they say, "a practice of allowing such contests would be fraught with the greatest danger to actual settlers, and would be subversive of

the principles upon which the munificent railway grants are based. As was said in the Dunmeyer case: 'It is not conceivable that Congress intended to place these parties (homestead and pre-emption claimants on the one hand and the railway company on the other) as contestants for the land, with the right in each to require proof from the other of complete performance of its obligations, least of all is it to be supposed that it was intended to raise up antagonism to all the actual settlers on the soil it has invited to its occupation, this great corporation with an interest to defeat their claims, and to come between them and the government, as to the performance of their obligations.'"

Notwithstanding such announcements by this Honorable Court since 1887, about which time the land in controversy became valuable by reason of the rapid growth of the city of Tacoma, on Puget Sound, the Sound terminus of the plaintiff's railroad, this rich railway corporation, this plaintiff in error, has been permitted to contest this Flett pre-emption, and the defendant's homestead claim through the local and General Land Office, and the Interior Department, and since 1892 through all the lower federal courts up to this Honorable Court of last resort; compelling an honest homestead claimant to bankrupt himself in order to obtain from the government land that was unoccupied government land when he presented his application to make homestead, at which time the records of the local and General Land Office showed this uncancelled claim of John Flett, this record and the law excluded the land from plaintiff's grant; and still they prosecute this matter to almost persecution, for the only purpose, in our opinion, of forcing this claimant to give up the fight, so they may hold the land under the patent is-

sued without anthority of law. Such things ought not to be.

We ask this Honorable Court to affirm the judgment of the Honorable United States Circuit Court of Appeals, and award the defendant in error judgment for his costs and disbursements for printing brief in this case.

A. W. BALLARD and
H. F. NORRIS,
Attorneys for Defendant in Error.
W. H. PRITCHARD,
Of Counsel.

No. 154.

Brief of Atty. Gen. (Russell) for U. S. (Pl.

Office Supreme Court U. S.
FILED
JAN 9 1899
JAMES H. McKENNEY,
Clerk.

Filed Jan. 9, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

NORTHERN PACIFIC RAILWAY COMPANY, plaintiff in error,
v.
JAMES DE LACEY.
No. 154.

BRIEF FOR THE UNITED STATES.

the Supreme Court of the United States.

OCTOBER TERM, 1898.

ORTHERN PACIFIC RAILWAY COMPANY,
plaintiff in error,
v.
JAMES DE LACEY.
} No. 154.

BRIEF FOR THE UNITED STATES.

While the title to the land involved in this contro-
rsy, unless the contention of the Railroad Company
at its title is good be correct, is and will be in the
nited States, yet the chief purpose of this brief is to
ll attention to the importance to the Government and
many others of the principle upon which the court of
peals rested its decision that the company should not
cover, viz:

That a recorded preemption claim existing at the date
the definite location of a railroad, with nothing then
record in the land office showing its cancellation or
tinguishment, conclusively precludes any possibility of
tle by the railroad company under its grant, when that
rant purports to except all lands as to which there are
reemption claims.

It does seem that this question is determined by prior
djudications of this court; but it may be well to say a

few words to point out the importance of its being set forever at rest.

As we look at it, the intent of Congress is perfectly clear from the granting acts. The language giving the boundary of the grant is sweeping, and should receive an interpretation in furtherance of an intent to accomplish a sweeping purpose. The act in the present case bounds the grant in part by saying, "lands to which the United States have *full* title, not *reserved*, sold, granted, or otherwise *appropriated*, and *free from* preemption, or *other* claims or rights."

For the land which is different from this and within certain limits a substitution is made of other lands, so that all interest of the company in questioning the character of these lands is eliminated.

The Secretary of the Interior is to proceed rapidly to issue patents for the lands, and manifestly not intended to spend a lifetime in distinguishing them. The road is all to be speedily completed, and long before it is completed, as soon as each 25 miles of it are built, he is to *confirm* to the company the title to the lands.

Whether the Government had full title, free from all claims or rights, unreserved, unappropriated, must therefore have been supposed to be something which he could rapidly determine.

And so it was. The records of his Department contained plats and records of all such free land. By his Department was kept a record of all reservations, appropriations, and dispositions of public land, and of all claims affecting public lands.

It must have been in view of these notorious facts that Congress adopted its plan of legislation. He could

see from his records whether the land was absolutely free from claims, and issue patents as speedily as might be desired.

With this plan, however, it would be utterly inconsistent to say that Congress intended an examination as to the status of the claims. "Claims or rights," Congress says, "preemption or other claims," any other claims. Such language shows that Congress was not balancing, or proposing to have the Secretary balance, the scales between a host of claimants and the company; but meant to draw a line—a boundary line—and say, never mind the status of the claims, never mind whether good or bad, never mind what the reservations or for what purpose, or the appropriations. If the title is not free from claims, free from reservations, free from appropriations, or sales, or grants, from rights whatsoever and claims whatsoever and appropriations and reservations whatsoever, then the land is not part of the land hereby intended to be granted in presenti, and the railroad company may go over to the indemnity sections to get the rest of the granted lands.

Partly to keep the public faith and partly arbitrarily, but always in sight of the Secretary with his records, Congress traced a boundary line for the grant. Along the arbitrary lines of that boundary claims good, bad, and indifferent, and whatever their status, were calls.

We say that Congress, upon good business principles, was telling the Secretary and the company, for the plat of this grant in presenti along those arbitrary lines, see the records of the Land Office.

But if this is not clearly the intent of Congress, the

alternative must be demonstrated, for every intendment is in favor of the public and against the grantee.

He who says that where there is an uncanceled claim of record the secretary was intended to determine whether in pais the preemptor had abandoned his claim, must prove it very clearly. Why that should be intended, when it is clearly not intended that the Secretary should inquire into the original invalidity of the claim, is a difficulty he must overcome at the outset. He must meet and overthrow the objection that the secretary would never know the intentions or conduct in pais of one out of a thousand of the preemption claimants at or before the definite location of a great railroad, and had no machinery for finding out. He must be able to show that Congress had in view so exceptional and occasional a matter as the lapse, by the abandonment in pais, of a preemption claim, when the existence and history of a preemption claim would naturally be expected to be evident from the records which are made under the statutes concerning such claims. He would logically be compelled to argue, or to admit, that where a man was making, in pais and without any declaration, a claim to land on which he had not settled, or a claim otherwise invalid, this should except the land, notwithstanding there was no record of any such claim. He must show that—Congress having provided a tribunal and method of proceeding by filing of record, proving of record, contesting of record, relinquishing of record, denying of record, cancelling of record—a preemption claim, a claim duly filed and of record awaiting action by the claimant or secretary, was not a matter sub judice within the intent

of Congress, which Congress intended to exclude by its comprehensive words relating to *public* lands free from claims. Does a matter cease to be sub judice the moment a plaintiff does an act which, if and when duly proven, would defeat his suit? We do not so understand the meaning of that phrase. And this court has determined that lands sub judice are not *public* lands within the meaning of such a grant. To say that this matter had ceased to be sub judice is to say that it was wholly without jurisdiction that the proceedings recited in Finding XVII took place, and to make a very rash statement concerning the methods of land office procedure with which Congress was familiar.

What Congress did not manifestly and indisputably grant it must be held not to have intended to grant. And can it be said to have manifestly and clearly, while disregarding all other matters going to the merits of claims, granted lands as to which, by some tedious controversy involving matters *in pais*, it can now be made to appear to the *courts* that the recorded claims were made by persons who, ignorant of their rights, and misinformed, happened to be omitting to press them? Was Congress manifestly and clearly legislating about future *litigation* or about a *conveyance* of its own free and unclaimed public, unreserved and unappropriated, lands?

It seems to us that Congress took pains to avoid all lands about which any question could be raised between the company and anyone else, in or out of the courts. It had, of course, no intention to grant what it no longer owned; but that was a question between it and whoever had disputed its ownership, and it evidently sought

and intended to exclude all such questions—all questionable or doubtful land—from the business in hand. For that purpose it used as strong and comprehensive language as can well be conceived of, and we submit that the courts should not hunt about for hairsplitting methods to establish a restrictive construction of that tediously comprehensive language.

The intention of the law, apparent from the law, is the law, and matters beyond its words may be within the law. The general purpose and plan of a statute are often the best guides in its interpretation. The courts should aid a sweeping clause to a sweeping effect. Congress was evidently seeking to describe lands absolutely beyond controversy, question, or doubt, so that the patenting, availability, and deduction (granting act, sec. 3) of them might be reached "as fast as may be required by the construction of the road" (sec. 6), which was intended to be very rapid. The courts should give effect to a practical and businesslike scheme and not thwart it.

We shall not go into the question of the right of Flett as distinguished from his claim. So far as we can see, his right as against the Government was established by settlement, declaration, and offer to do the rest, which the officials would not permit him to do. As between him and the Government, it seems to us that his entry was properly regarded in 1887 as good and valid and then available, by the same officials or their successors and by the Commissioner of the General Land Office. If it ever was less than that, it seems to us that (so far as the findings of fact show) it must have become so in

1886 by reason of some better right initiated in April, 1886, by the entry of DeLacey, a third party.

Whether Flett is still asserting his right and should be accorded it, it is not necessary in this ejectment proceeding to inquire; but certainly, if he had a right up to 1886, his preemption right as such excepted the land from the grant as clearly as if the land had been "sold" or "granted."

Flett's opinion in 1870, or at any other time, as to whether he had such right is a matter of no importance. If not, yet we do not know what it was at any given time from September, 1870, to September, 1887, when we find him asserting his right vigorously. He was told in September, 1870, that the railroad owned the land and that he had lost it. Whether he then believed that, or, being a poor settler, regarded a false claim by the railroad and the refusal of the land officers to let him "prove up" as equivalent to a loss of his own good title, we do not know, either. Nor are any of these things to be presumed against him in this ejectment proceeding. It is for the company to show that the land is within its grant or it can not obtain a writ of possession. The whole discussion about Flett is irrelevant for any other purpose than to throw light on the question, Has the company shown that the land is within its grant? That it must affirmatively prove, and that is the only issue in the case. The land may be De Lacey's, or Algyr's, or Flett's, or the Government's, or some one else's, or legally the Government's and equitably some one else's. The company can not get it without showing and clearly demonstrating, upon the facts

found, that Congress intended to include it in the grant to itself.

Neither shall we dwell upon the question, whether this land was, by the receipt of Flett's money and issuing of a certificate to him and recording his claim, "reserved" land. Reserved is a very broad word. Lands set apart for any of a hundred purposes—purposes which might fail or might have already failed, when the road was located—would seem to be beyond the boundary of this grant. This land was set apart by the Department for an inquiry into the original validity and subsequent prosecution of the claim of John Flett. Certainly, before the supposed abandonment, it was so set apart and was reserved. By what act, except the cancellation in 1891, did it cease to be reserved by the Department?

Nor need we contend that the land was "appropriated"—appropriated in 1869 to John Flett upon conditions as to which the company had no right to raise any question—conditions which could have been waived, so far as matters of delay and the like were concerned, by the Secretary or the board of equitable adjudication. (R. S., 2450.)

We submit that the company has wholly failed to make out such a case of clear and unmistakable grant to itself, as the law requires it to do.

Respectfully,

CHARLES W. RUSSELL,
Assistant Attorney, Department of Justice.

FILED
FEB 23 1899
JAMES H. McKENNEY,
Clerk

UNION PACIFIC RAILWAY CO. *v.* FRANK F. FISHER.

Acting Secretary Ryan to the Commissioner of the General Land Office,

(W. V. D.) *February* 1, 1899.

The Union Pacific Railway Company has appealed from your office decision of May 15, 1897, holding that the pre-emption filing of Almon Benton excepted the NW. ¼ of the NE. ¼, Sec. 13, T. 7 S., R. 11 E., Topeka land district, Kansas, from the grant made by the act of July 1, 1862 (12 Stat. 489), and the amendment thereto of July 2, 1864 (13 Stat. 356).

This tract is within the limits of that grant and the line of road opposite thereto was definitely fixed by the map of definite location filed January 11, 1866.

The land was offered for sale under proclamation No. 636, dated March 22, 1859, under which a sale of public lands commencing September 19, 1859, was held at the Kickapoo land office. While offered for sale the tract was not sold, and thereupon took the status of offered land.

August 5, 1862, Almon Benton filed pre-emption declaratory statement embracing said tract, in which July 21, 1862, was given as the date of his settlement, but the filing was never perfected into an entry. At the date of the definite location of the line of road, this filing had not been formally canceled upon the records of the local office, and for that reason it is held in your office decision that the land covered by the filing was excepted from the grant.

The railroad company listed the tract for patent under its grant June 21, 1881, but notwithstanding this listing the local officers, without notice to the company, permitted Frank F. Fisher to make homestead entry of the tract October 7, 1896, and this entry is sustained by your office decision.

What was the status of Benton's pre-emption filing at the date of the definite location of the line of road? Was it at that time an existing pre-emption claim, within the meaning of the granting acts? If it was, the land embraced therein was excepted from the grant.

By the terms of section three of the granting act there was excepted from the grant all mineral lands and all lands "sold, reserved, or otherwise disposed of by the United States" or "to which a pre-emption or homestead claim may . . . have attached, at the time the line of said road is definitely fixed," and by section four of the amendatory act it was provided:

> . . . And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler, on any lands returned and denominated as mineral lands. . . .

The main contention of appellant is that the tract was offered land at the time of the filing thereon by Benton and that the filing had, by operation of law, wholly expired and become altogether inoperative before the definite location of the line of road and was therefore as completely extinguished as if formally cancelled.

It becomes necessary to inquire what were "offered" lands, and to ascertain the effect and status of a pre-emption filing thereon.

Originally the controlling purpose in disposing of the public lands was the obtaining of public revenue. Under the proclamation of the President and after appropriate public notice the lands were offered at public sale to the highest bidder, the minimum price being one dollar and twenty-five cents per acre, and if when so offered a tract remained unsold, it became subject to private sale under section 3 of the act of April 24, 1820 (3 Stat. 566, R. S., Sec. 2357), which provided:

> . . . and all the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry as aforesaid; . . .

As a result of this system of public and private sales, the public lands came to be spoken of as "unoffered" lands, meaning those which had not yet been exposed to public sale, and "offered" lands, meaning those which had been exposed to public sale but remained unsold. The latter, but not the former, were subject to private sale or entry at the minimum price. It will not be necessary to here refer to a class of lands the status of which has been affected by a change in the price thereof as shown in the case of Eldred *v.* Saxton (19 Wall. 189).

The pre-emption act of September 4, 1841 (5 Stat. 453, Secs. 10–15), gave a preferred right to purchase or enter, at the minimum price, not exceeding one hundred and sixty acres, or a quarter section, of public land to one who should make a personal settlement thereupon, inhabit and improve the same, and erect a dwelling-house thereon. This preferred right extended equally to unoffered and offered lands, except that by section 14 it was provided respecting unoffered lands:

> That this act shall not delay the sale of any of the public lands of the United States beyond the time which has been, or may be, appointed by the proclamation of the President, nor shall the provisions of this act be available to any person or persons who shall fail to make the proof and payment, and file the affidavit required before the day appointed for the commencement of the sales as aforesaid.

and by section 13 it was provided respecting offered lands:

> That whenever any person has settled or shall settle and improve a tract of land, subject at the time of settlement to private entry, and shall intend to purchase the same under the provisions of this act, such person shall in the first case, within three months after the passage of the same, and in the last within thirty days next after the date of such settlement, file with the register of the proper district a written

statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit, and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof, and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

Thus the effect of the act of 1841 was that, as to unoffered lands, the filing of a pre-emption declaratory statement was not required, but the preference right of purchase was lost unless exercised by the making of due proof and payment before the time fixed for the public sale, in which event the land would be offered and sold to the highest bidder, and if not sold would become subject to private entry by the first applicant, at the minimum price. As to offered lands, the preference right was dependent upon the filing of a declaratory statement in the local office within thirty days after the time of settlement and would be lost unless exercised by the making of due proof and payment within twelve months after the date of settlement.

Under the statute regulating sales of public lands, unoffered land could not be purchased at any price or in any manner in advance of the public sale, while offered land was at all times subject to purchase by the first applicant at a fixed price. The pre-emption act of 1841 gave to one complying with the terms thereof the privilege of purchasing unoffered land at the same fixed price at any time before the day appointed for the commencement of the public sale. This was the conferring of an entirely new privilege, but the privilege of purchasing offered lands at the fixed price was conferred by the act of April 24, 1820, and existed independently of the pre-emption law, so that as to them the only effect of the act of 1841 was to give to one complying with its terms a period of twelve months from the time of settlement within which to fully exercise his privilege and make payment for the land. This was not the conferring of an entirely new privilege, but rather the modification or enlargement of an existing one.

The act of March 3, 1843 (5 Stat. 621), supplemented the pre-emption act of 1841, and by section 5 required that settlers upon unoffered lands should file a declaratory statement in the local office within three months from the time of settlement, in default of which the tract would be awarded to the next settler in order of time who should file such statement and otherwise comply with the law, and section 9 referring to the provision respecting offered land, in section 15 of the act of 1841, to the effect that the tract would be subject to the entry of any other purchaser unless the preference right was exercised by the making of proof and payment within twelve months after the date of settlement, provided as follows:

. . . And said act shall not be so construed as to preclude any person who may have filed a notice of intention to claim any tract of land by pre-emption under said

act, from the right allowed by law to others to purchase the same by private entry *after the expiration of the right of pre-emption.*

Respecting the right or privilege secured by a pre-emption filing, the two acts of 1841 and 1843, taken together, made a difference between unoffered and offered lands in that on unoffered lands the right or privilege continued up to the commencement of the public sale whenever that might be, and if the filing had not then been perfected into an entry the land was offered at the public sale, and if not sold became subject to private entry by the first applicant, and on offered lands the right or privilege continued for twelve months from the time of settlement, and if the filing had not then been perfected into an entry, the land was likewise subject to private entry by the first applicant, the person who made the filing having the same right as others to thereafter purchase the land by private entry. The effect, however, of a failure to carry a pre-emption filing into an entry within the time prescribed by these acts was the same whether the filing embraced unoffered or offered lands, that is, the right or privilege secured by the filing terminated *ipso facto*, by operation of law, and thereafter the person who made the filing had no greater or different right or privilege of purchasing or entering the land than was possessed by others, and had no greater or different right or privilege of purchasing or entering the land than he would have possessed if he had not made the filing. If at the time of the filing the land was unoffered, he could purchase at the public sale by becoming the highest bidder, or if it remained unsold at the close of such sale he could then make private entry thereof at the minimum price upon the same terms accorded to others, but neither at the public sale nor in making such private entry would his filing avail him anything whatever. So if the land was offered land at the time of the filing, upon the expiration of the time for carrying the filing into an entry the land became subject to private entry by the person who made the filing upon the same terms that it was subject to such entry by others, but the filing would be of no advantage to him either in the presence or absence of other applicants. This result was not dependent upon the cancellation of the filing upon the records of the local office, nor was it the custom or practice of the Land Department to make a formal cancellation of such filings. The absence of a formal cancellation was therefore no indication that the officers of the Land Department recognized the expired filing as one thereafter to be prosecuted to confirmation, nor, indeed, would such recognition have been within the range of their authority.

That the "*right of pre-emption*," in the instance of offered lands, expired by operation of law with the expiration of the time for making proof and payment, and was so regarded by Congress, is fully illustrated by section 9 of the act of 1843, where it is provided that one who may have filed a pre-emption declaratory statement for offered land under the act of 1841 shall not be excluded "from the right allowed by law to others

to purchase the same by private entry after the *expiration of the right of pre-emption.*"

The fact that a filing had thus terminated and that all rights and privileges thereunder were extinguished, was as much a matter of record in the local office as would be a formal entry of cancellation, so that no inquiry into matters not shown by the records of that office was necessary in determining the status or effect of the filing. The date of settlement given in the declaratory statement, whether the filing had been perfected into an entry, whether the land was unoffered or offered at the time of the filing, and if unoffered whether it had since been exposed to public sale, were matters necessarily appearing upon the records of the local office. It follows, therefore, that under the acts of 1841 and 1843 a pre-emption filing, whether made upon unoffered or offered land, did not, after the expiration of the time for making entry thereunder, constitute even an apparent record claim to the land. The same record which gave notice of the filing gave like notice of its termination. The filing was thereafter of no advantage to the claimant which a formal cancellation would withdraw, and it was no obstacle to the disposition of the land which such a cancellation would remove.

In Union Pacific Railway Co. *v.* Hartwick (26 L. D., 680), it was held that a pre-emption filing made on unoffered lands was extinguished by operation of law, if proof and payment were not made thereunder before the day appointed for the commencement of the public sale at which such land was offered, and that a formal cancellation upon the records was not necessary to put an end to the pre-emption right.

The case under consideration is essentially different from that of a filing which has become subject to cancellation by the claimant's failure to maintain personal settlement, his ownership of 320 acres of other land, or his agreement to sell the land before entry. In such a case the claim would not be enforceable by the claimant and would be subject to cancellation upon an ascertainment of the facts, but in the absence of such ascertainment matters of this character would not appear upon the records of the local office, and would, therefore, not affect the status of the filing as an existing claim.

The status of the land at the time of the definite location of the road, January 11, 1866, constitutes the criterion by which the lands to which the company is entitled are to be determined. Van Wyck *v.* Knevals (106 U. S. 360); Kansas Pacific Ry. Co. *v.* Dunmeyer (113 U. S. 629). At that time Benton's pre-emption filing made upon offered land August 5, 1862, and based upon a settlement made July 21, 1862, had expired by operation of law, as shown by the records of the local office, and had no more effect as a claim to the land than if it had never been made. It is not claimed that Benton's settlement continued after the expiration of his filing, and up to the time of the definite location of the line of road, but this was not deemed material by your office, and is not deemed material by the Department.

Following the enactment of the homestead law, May 20, 1862, the practice of disposing of public lands at public sale was gradually abandoned, and while the authority for such sales remained, it came to be rarely exercised. As before shown, under the statutes then existing, one making a pre-emption filing upon unoffered land had until the day appointed for the public sale within which to carry his filing into an entry by making proof and payment. The abandonment, therefore, of public sales resulted in giving to those who had made pre-emption filings upon unoffered land, an unlimited or indeterminate time within which to perfect or complete their claims by making proof and payment. To correct this situation, the act of July 15, 1870 (16 Stat. 279), and the resolution of March 3, 1871 (16 Stat. 601), provided that claimants for unoffered lands should make the proper proof and payment within thirty months after the date prescribed for filing declaratory statement. (See Sec. 2267, R. S.) These additional enactments being subsequent to the definite location of the company's line of road, and being limited to unoffered lands, do not affect the case at bar, and are now mentioned only for the purpose of completing the historical statement of the legislation affecting the general subject under consideration. Any discussion of their effect upon filings upon unoffered land must be left to a case whose facts make such discussion necessary.

The views here expressed are not altogether in conflict with the decisions of the Department in the cases of Allen *v.* Northern Pacific R.R. Co. (6 L. D. 520); Schetka *v.* Northern Pacific R.R. Co. (5 L. D. 473), and Emerson *v.* Central Pacific R.R. Co. (3 L. D. 117 and 271). At the time when these decisions were rendered, the Department held that settlement, inhabitancy, and improvement constituted a pre-emption claim within the meaning of the excepting clauses of this and other similar railroad grants, and that lands so settled upon, inhabited and improved at the time of the definite location of the line of road, were excepted from the grant, although no declaratory statement had been filed or action taken in the land office, whereby a claim to the land had been asserted or recognized. The decisions cited applied this holding to the cases of persons who made pre-emption filings upon offered land and failed to make proof and payment within the time prescribed, but who, when the line of road was thereafter definitely located, were still inhabiting the land; and in support thereof it was said that "the pre-emption law bases the pre-emption right on settlement," and that "the mere fact that the pre-emptor's filing had lapsed is not sufficient evidence of the abandonment of his claim." That which was thus held to except the land from the grant was the settlement and not the expired filing. In the Schetka case a filing was made upon offered land by one Barth, and the time for making proof and payment thereunder expired before the definite location of the line of road. It was held: "If the settlement existed at the time of the definite location, the claim of the company is at an end. If, however, the claim of Barth to the

land had ceased at that date, I see no reason from this record why the tract should not be awarded to the company." In the Allen case, a filing upon offered land, made by one Fittler, had expired before definite location, and the decision, calling attention to the absence of an allegation that the original claimant continued to hold the land at the time of the definite location of the road, ordered a hearing to ascertain the facts in that connection, and held that "if the land was at that date free from the settlement claim of Fittler, aforesaid, I see no reason from the present record why the railroad company should not get the land." These were, in effect, decisions that an expired filing upon offered land, although not formally cancelled upon the records of the local land office, did not constitute such a pre-emption claim as excepted the land from the grant, for clearly there was no occasion to inquire whether personal settlement or inhabitancy had been maintained up to the time of the definite location of the line of road, if the filing itself, although expired, defeated the grant. That this is the proper interpretation of these decisions is shown by the subsequent cases of Northern Pacific R.R. Co. *v.* Stovenour (10 L. D. 645) and Meister *v.* St. Paul, Minneapolis and Manitoba Ry. Co. *et al.* (14 L. D. 624). In the Stovenour case, which involved unoffered land, it was said:

This conclusion renders it necessary further to consider whether the land was "free from pre-emption, or other claims or rights," at the date when the line of the company's road was definitely located, to wit: July 6, 1882. At that date, it will be observed, the time prescribed by statute, within which proof and payment were required to be made under the declaratory statements of Pare and Yeaman, had elapsed without proof and payment having been made. These declaratory statements were, therefore, at the date when the company's rights attached under its grant, what are usually denominated "expired filings;" and there is no evidence, or allegation, even, that the parties named were then settlers, or residents on the land.

Were those filings, nevertheless, "pre-emption claims," such as served to except the land from the grant? I am of the opinion that they were not. Upon the expiration of the time limited by statute for the making of proof and payment, without such proof and payment having been made, the presumption arose that whatever claim, or claims, had previously attached to the land, under or by reason of such filings, had been abandoned, and no longer in fact existed. This presumption, however, was not conclusive, but was open to rebuttal by any one claiming an interest in or right to the land, who might allege the contrary. The claimant, Stovenour, has made no such allegation in this case. So far as the record shows, the land in dispute was *prima facie* subject to the grant to the company at the date of the definite location of its road, and must be held, therefore, in the absence of any allegation or showing to the contrary, to have passed under the grant.

In the Meister case, which involved offered land, it was said:

Said land was offered at public sale October 26, 1864. On July 8, 1869, Garrett Cronk filed pre-emption declaratory statement (No. 81) for said tract and others, alleging settlement July 3, 1869, but never attempted to perfect title under said filing.

You affirmed the decision of the local officers on the ground that Cronk's filing expired before the attachment of rights under said grant, and that said land therefore inured to said grant.

On appeal to this Department, Meister alleges error in rejecting his application on such ground. Under the pre-emption law (Sec. 2264 of the Revised Statutes) it was necessary for Cronk, within twelve months after the date of his settlement, to "make the proof, affidavit, and payment" required, and upon failure thereof said land became "subject to the entry of any other purchaser." Cronk never complied with this provision of the law. The twelve months from his settlement expired July 5, 1870, and said tract then became *prima facie* vacant public land, and subject to the grant of the company at the date of the definite location of its road on December 19, 1871, and must be held to have passed under its grant in the absence of any showing to the contrary.

The holding of the Department upon which all these decisions seem to have been predicated, viz., that settlement, or settlement followed by inhabitancy and improvement, constitutes a pre-emption claim with the excepting clauses found in this and similar grants to aid in the construction of railroads, has given way to subsequent rulings of the Supreme Court fully establishing what is a pre-emption or homestead claim within the meaning of these granting acts. The court's rulings are here given in its own language.

In Kansas Pacific *v.* Dunmeyer (113 U. S. 629, 640, 644) it is said:

The land granted by Congress was from its very character and surroundings uncertain in many respects, until the thing was done which should remove that uncertainty, and give precision to the grant. Wherever the road might go, the grant was limited originally to five sections, and, by the amendment of 1864, to ten sections on each side of it within the limit of twenty miles. These were to be odd-numbered sections, so that the even-numbered sections did not pass by the grant. And these odd-numbered sections were to be those "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead right had not attached at the time the line of said road is definitely fixed." When the line was fixed, which we have already said was by the act of filing this map of definite location in the General Land Office, then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had then been made. Where they had not been made, this determination was only postponed until the survey should have been made. This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them. In regard to all such sections they were not granted. The express and unequivocal language of the statute is that the odd sections *not* in this condition are granted. The grant is limited, by its clear meaning, to the other odd sections, and not to these.

. . . . . .

In the case before us a claim was made and filed in the land office, and there recognized, before the line of the company's road was located. That claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the act of Congress this homestead claim had *attached* to the land, and it therefore did not pass by the grant.

Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if, in a deed, it had been excluded from the conveyance by metes and bounds.

The Dunmeyer decision is cited with approval in Dakota Railroad Co. *v.* Whitney (132 U. S. 357), and Whitney *v.* Taylor (158 U. S. 85). In the latter it is said at page 93:

With reference to the first of these reasons it is true that there must be a settlement and improvement in order to justify the filing of such a declaratory statement. Settlement is the initial fact. The act of September 4, 1841, c. 16, 5 Stat. 453, which was in force at the time of these transactions, gave the right of pre-emption to one making "a settlement in person," and who inhabits and improves the land and erects a dwelling thereon (§ 10), and authorized the filing of a declaratory statement within three months after the date of such settlement. (§ 15.) In this respect a pre-emption differs from a homestead, for the entry in the land office is in respect to the latter the initial fact. Act of May 20, 1862, c. 75, 12 Stat. 392; Rev. Stat. § 2290; Maddox *v.* Burnham, 156 U. S. 544. But it is also true that settlement alone without a declaratory statement creates no pre-emption right. "Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose." Lansdale *v.* Daniels, 100 U. S. 113, 116. And the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the pre-emption claim. While the cases of Kansas Pacific Railway Co. *v.* Dunmeyer, and Hastings & Dakota Railway Co. *v.* Whitney, *supra*, involved simply homestead claims, yet, in the opinion in each, pre-emption and homestead claims were mentioned and considered as standing in this respect upon the same footing. Further, it may be noticed that the granting clause of the Pacific Railroad acts, differing from similar clauses in other railroad grants, excepts lands to which pre-emption or homestead "claims" have attached, instead of simply cases of pre-emption or homestead "rights." And the filing of this declaratory statement was, in the strictest sense of the term, the assertion of a pre-emption claim, and when filed and noted it was officially recognized as such.

In Northern Pacific Railroad Co. *v.* Colburn (164 U. S. 383, 386, 388), it is said:

But frequent decisions of this court have been to the effect that no pre-emption or homestead claim attaches to a tract until an entry in the local land office. Thus, in the case of Kansas Pacific Railroad *v.* Dunmeyer, 113 U. S., 629, 644, Mr. Justice Miller, speaking for the court, said:

"Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation."

This language was quoted and the decision reaffirmed in Hastings & Dakota Railroad *v.* Whitney, 132 U. S., 357; Whitney *v.* Taylor, 158 U. S., 85. In Lansdale *v.*

Daniels, 100 U. S., 113, 116, it was ruled that "such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose." See, also, Maddox *v.* Burnham, 156 U. S., 544. Now, in this case the allegations are that Kelly never made any entry in the local land office, and the decision of the Secretary of the Interior is based simply on the fact of occupation and cultivation. And while the decision of that fact may be conclusive between the parties, his ruling that such occupation and cultivation created a claim exempting the land from the operation of the land grant, is a decision on a matter of law which does not conclude the parties, and which is open to review in the courts.

. . . . . .

For the reasons above indicated, because the decision of the Land Department was only on matters of fact and did not conclude the law of the case, and because such facts so found were not of themselves sufficient to disturb the title of the railroad company, the judgment is reversed. . . .

In this connection see Wight *v.* Central Pacific R.R. Co. (27 L. D., 182) and Central Pacific R.R. Co. *v.* Hunsaker (27 L. D., 297).

After a careful examination of the statutes and of judicial and Departmental decisions, it is held that an expired pre-emption filing upon offered land is not an existing or subsisting claim upon the records of the local land office, and does not constitute a pre-emption or other lawful claim within the meaning of the excepting clauses of the grant here under consideration.

In some Departmental decisions, expressions are found attributing to the case of Whitney *v.* Taylor, *supra*, a conclusion different from that here announced. (See Fish *v.* Northern Pacific R.R. Co., 21 L. D. 165; 23 L. D. 15.) Without giving any consideration to whether the land in question was offered or unoffered, or whether a filing upon offered land, shown by the records of the local land office to have expired by operation of law, is any more an existing or subsisting record claim than one shown by those records to have been canceled or set aside for matters *de hors* the record, these decisions quoted, and give special force to, the following extract from the opinion in that case:

. . . when on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the Government and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this, notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the Government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard. . . .

. . . Jones had filed a claim in respect to this land, declaring that he had settled and improved it, and intended to purchase it under the provisions of the pre-emption law. Whether he had in fact settled or improved it was a question in which the Government was, at least up to the time of the filing of the map of definite location, the only party adversely interested. And if it was content to let that claim rest as one

thereafter to be prosecuted to consummation, that was the end of the matter, and the railroad company was not permitted by the filing of its map of definite location to become a party to any such controversy. . . .

That case involved the effect of an unexpired pre-emption filing upon unoffered land existing upon the records of the local office at the time of the definite location of the company's line of road, March 26, 1864. It was charged by the company that the claimant had not made settlement upon the land, or that if such a settlement had been made the claim had been abandoned before the definite location of the line of road. A consideration of the entire decision seems to indicate that what was said in the extract quoted above was in response to this charge. It was also charged that the filing was not followed by payment and final proof within the time prescribed, and that at the date of the definite location of the company's line of road the filing had become, in the nomenclature of the land office, an expired filing, and the land had become thereby discharged of all claim by reason thereof. In response to this charge the court, quoting from the decision of the Secretary of the Interior thereon, said:

It thus appears that the tract in question remained in the category of unoffered lands, and was not proclaimed for sale. The pre-emption act of March 3, 1843 (5 Stat., 620), provided that the settler on unoffered land might make proof and payment at any time before the commencement of the public sale, which should embrace his land. Until such time arrived the filing protected the claim of the settler. This was the status of the law at the time said company's rights attached, and it so continued until modified by the act of July 14, 1870. (16 Stat., 279.)

That this decision upon the effect of an unexpired filing upon unoffered land is not a decision upon the effect of an expired filing upon offered land is manifest, and that the court does not consider that the status of an expired filing was thereby determined seems probable in view of the subsequent decision in Northern Pacific Railroad Company *v.* Colburn (164 U. S., 383, 388), where the court says:

There are other questions in this case, such as the significance of an "expired filing," . . . But as none of these matters were considered by the Supreme Court of the State, and are not noticed by counsel for defendant in error, we deem it unwise to make any observations thereon, leaving them for consideration in the future progress of the case.

The decision of your office is reversed, and the entry of Fisher is ordered cancelled. Herewith are the papers.

OPINION

Statement of the Case.

NORTHERN PACIFIC RAILWAY COMPANY *v.* DE LACEY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 154. Argued and submitted January 18, 1899. — Decided May 22, 1899.

The right of Flett, under whom De Lacey claims, was a right of preëmption only, which ceased at the expiration of thirty months from the filing of its statement, by reason of the failure to make proof and payment within the time required by law, and it is not necessary, in order that the law shall have its full operation, that an acknowledgment of the fact should be made by an officer in the land office, in order to permit the law of Congress to have its legal effect; and when the defendant settled upon the land in April, 1886, and applied to make a homestead entry thereon, his application was rightfully rejected.

The record shows that at the time of the commencement of this action the railway company was the owner and entitled to the immediate possession of the land in controversy, and that it was entitled therefore to judgment in its favor.

THIS is an action of ejectment brought by the plaintiff in error against the defendant to recover possession of 160 acres of land situated not far from Tacoma in the State of Washington.

The land lies within the primary limits of the land grant both of the main line of the railroad of plaintiff in error, as definitely located between Portland and Puget Sound, and the Cascade branch, as definitely located between the point where the railroad leaves the main line and crosses the Cascade Mountains to Puget Sound.

It appears from the facts found upon the trial, without a jury, that the plaintiff's predecessor was incorporated under the act of Congress of July 2, 1864, c. 217, 13 Stat. 365, and received a grant of public lands by virtue of section 3 of that act. A further grant was made by virtue of the joint resolution of Congress, adopted May 31, 1870. 16 Stat. 378, Resolution No. 67.

The company surveyed and definitely located the line of its

branch road extending from Tacoma to South Prairie, and on March 26, 1884, filed its map, showing such line of definite location, in the office of the Commissioner of the General Land Office. The land in controversy is within the limits of the grant to the company as defined by this map of definite location, and is within the limits of the grant under the act of July 2, 1864.

The following statement is taken from the finding of facts by the trial judge:

"XII. April 9, 1869, one John Flett filed declaratory statement No. 1227, declaring his intention to purchase certain lands which are described in the complaint, under the laws of the United States authorizing the preëmption of unoffered lands. Whether or not Flett was at this time qualified to enter the land under the preëmption or homestead laws does not appear.

"XIII. In the fall of 1869 Flett left the land in controversy and did not thereafter reside thereon, although it is recited in the decision of the Secretary of the Interior in a contest between the railroad company, De Lacey, Flett, et al., before the Interior Department, involving the land here in controversy, that in September, 1870, Flett went to the local land office and told the officers that he had come to prove up on his claim; that they told him it was railroad land and that he had lost it; that Flett did not then actually offer to make proof, but acquiesced in the advice of the local officers that he was not entitled to submit proof under his filing."

"XV. The defendant, James De Lacey, settled upon the land in controversy in April, 1886. April 5, 1886, he applied to make homestead entry thereon. His application was rejected for the reason that the land fell within the limits of the grant to the railroad company on both main and branch lines. From this decision by the register and receiver De Lacey appealed to the Commissioner of the General Land Office.

"XVI. September 7, 1887, John Flett submitted proof in support of his preëmption claim, founded upon his declaratory statement filed April 9, 1869.

Statement of the Case.

"XVII. Afterward, under the instructions of the Commissioner, a hearing was had, at which all the parties, the railroad company, James De Lacey, John Algyr and John Flett were present. July 27, 1889, the receiver of the district land office found that Flett had not voluntarily abandoned the land in 1869, and that his entry should be reinstated. From this finding all the parties but Flett appealed to the Commissioner of the General Land Office, and December 5, 1889, the Commissioner sustained the finding of the receiver. Thereafter the other parties to the contest appealed to the Secretary of the Interior. September 28, 1891, the Secretary of the Interior reversed the ruling of the Commissioner of the General Land Office, and awarded the land in controversy to the railroad company.

"December 13, 1892, letters patent of the United States, regular in form, were issued, conveying the land in controversy to the plaintiff."

"XIX. Flett's declaratory statement was not formally cancelled upon the records until December 23, 1891.

"XX. The defendant is in possession of the land and withholds such possession from the plaintiff."

It also appeared that the railroad company on May 10, 1879, transmitted to the office of the Secretary of the Interior a map showing its relocated line of general route, which map was on June 11, 1879, sent to the Commissioner of the General Land Office by the Secretary for filing, with instructions to withdraw the lands coterminous therewith from sale, preemption or entry for the benefit of the railroad company, and the map was duly filed on that day. The land in controversy is within the line as relocated.

The conclusions of law of the Circuit Court were in favor of the railroad company, and the court held that prior to June 11, 1879, when the map of general route as relocated was filed, and after the abandonment of the land by John Flett, the same was public land of the United States, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights, and that from that date (June 11, 1879) the land was reserved from sale,

Counsel for Parties.

preëmption or entry, except by the railroad company, by virtue of fixing the line of general route of the branch line coterminous therewith; that this reservation became effective from and after the receipt of the order of the Commissioner at the United States district land office on July 19, 1879.

Judgment in favor of the plaintiff for the recovery of the possession of the land was duly entered. Upon appeal by the defendant to the Circuit Court of Appeals for the Ninth Circuit, that court reversed the judgment and remanded the cause to the Circuit Court for further proceedings not inconsistent with the views expressed in the opinion of the Court of Appeals. Judgment in accordance with the opinion of that court was subsequently entered by the Circuit Court, dismissing the plaintiff's complaint, and awarding costs to the defendant. This was done under objection of plaintiff, which claimed the right to a new trial, and exception was taken thereto.

It appearing that the plaintiff, the Northern Pacific Railway Company, had subsequently to the hearing acquired the rights of the original plaintiff to the property described in the complaint, it was substituted as plaintiff in this action. A writ of error was then taken to the United States Circuit Court of Appeals for the Ninth Circuit, where the judgment of the Circuit Court was affirmed. The plaintiff by writ of error brought the case here for review.

The opinion of the Circuit Judge, given upon the trial of the cause, is reported in 66 Fed. Rep. 450, and that of the Circuit Court of Appeals in 44 U. S. App. 257.

Mr. C. W. Bunn for plaintiff in error. *Mr. James B. Kerr* was on his brief.

Mr. W. H. Pritchard for defendant in error submitted on his brief.

Mr. Solicitor General and *Mr. Assistant Attorney Russell* for the United States submitted on their brief.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The grant of lands to aid the construction of that portion of the main line of the railroad of the plaintiff in error, between Portland and Puget Sound, dates from the joint resolution of May 31, 1870, and prior to that time there was no land grant in aid of the construction of that portion of the road. *United States* v. *Northern Pacific Railroad Company*, 152 U. S. 284, 292.

At the time of the adoption of the resolution of 1870 there had been filed, April 9, 1869, in the local land office the statement of John Flett, declaring his intention to purchase the lands in dispute under the laws of the United States authorizing the preëmption of unoffered lands, and that entry being unforfeited and uncancelled, operated to except the lands from that grant. We may therefore confine our attention to the grant under the act of July, 1864, and the subsequent proceedings which relate to that grant.

At the time of the passage of that act the United States owned the land in question as public land, and as to that land it had, as specified in the third section thereof, "full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights," and no portion of this land had at that time been "granted, sold, reserved occupied by homestead settlers, or preëmpted, or otherwise disposed of." On the 26th of March, 1884, the plaintiff had filed its map of definite location in the office of the Commissioner of the General Land Office, which map embraced the land in controversy.

The filing of such a map of definite location of a railroad determines the right of the railroad company to the land under the land grant acts of Congress. *Kansas Pacific Railway Company* v. *Dunmeyer*, 113 U. S. 629; *Sioux City &c. Company* v. *Griffey*, 143 U. S. 32, a grant similar in its nature to the one under consideration.

If there had been a preëmption claim at the time of the passage of the act of 1864, the land would not have passed under that grant. *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535.

Opinion of the Court.

It is contended that at the time (March 26, 1884) when the map of definite location was filed, the declaratory statement of Flett, filed in the local land office in 1869, remained there as a record, and was an assertion of a preëmption claim, and the defendant maintains that under the case of *Whitney* v. *Taylor*, 158 U. S. 85, the land described in that declaratory statement was excepted from the grant to the railroad company, and that the company therefore never acquired title to the land by filing its map of definite location under the grant contained in the act of 1864.

The learned judge, in delivering the opinion of the Circuit Court of Appeals in the case at bar, quoted the following language from the opinion of this court in *Whitney* v. *Taylor*, 158 U. S. 85, 92.

"That when on the records of the local land office there is an existing claim on the part of an individual under the homestead or preëmption law, which has been recognized by the officers of the government and has not been cancelled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the Government at its own suggestion or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim; it was enough that the claim existed, and the question of its validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard."

The Circuit Judge then stated that the controlling fact in this case was "that at the time of the definite location of the plaintiff's road, opposite which the land in controversy is situated, there was on the record of the local land office Flett's declaratory statement which had not been altered, amended, cancelled or set aside; and that fact operated to except the land in respect to which the claim existed from the grant to the railroad company."

The single question in this case is, therefore, whether the proceedings in the case of Flett were of such a nature as to prevent the grant to the company under the act of 1864 from taking effect at the time of the filing of its map of definite location, March 26, 1884.

The defendant contends that the land in controversy was excluded by operation of law from the grant of 1864 by the resolution of May 31, 1870. Herein he assumes that the effect of that resolution was to blot out the grant under the act of 1864. The resolution did not have that effect. It was not an amendment to the third section of the act of 1864 which granted the lands. If at that time (1870) certain claims had been filed against this land by reason of which it was excepted from the grant of 1870, such fact has no bearing upon the provisions of the act of 1864, at which time there was no claim upon this land, and if none existed when the map of definite location was filed in 1884, the grant included the land. The assertion that when the grant of 1864 was made there was a preëmption claim in existence is not borne out in law or fact by asserting the existence of such a claim when the grant of 1870 was made, and that by operation of that resolution the grant of 1864 was so amended as to exclude that land. It was not excluded. The fact that no claim existed at the time the act of 1864 was passed remained notwithstanding the adoption of the resolution of 1870, and the question therefore still recurs whether in 1884, when the map of definite location was filed, there was any claim upon this land which excepted it from the grant by virtue of the act of 1864.

It is well to examine the statutes relating to the right of preëmption under which the declaratory statement of Flett was filed in order to determine the rights, if any, which he had at the time when the company's map of definite location was filed.

That statement, filed by Flett in 1869, was to the effect that he intended to purchase the land which he described, "under the laws of the United States, authorizing the preëmption of unoffered lands." By the term "unoffered lands" is meant those public lands of the United States which have not been

offered at public sale. By section 3, chapter 51, of the act of Congress making further provision for the sale of public lands, approved April 24, 1820, c. 51, 3 Stat. 566, the price for which public lands should be offered for sale after the first day of July, 1820, was fixed at $1.25 an acre, and it was provided that at every public sale the highest bidder, who should make payment as prescribed, should be the purchaser, but no land was permitted to be sold at either public or private sale for a less price than $1.25 an acre; and it was further provided in that section that "All the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry as aforesaid; with the exception," etc.

After the passage of this act the public lands came to be spoken of as "unoffered lands," or those which had not been exposed to public sale, and "offered lands," or those which had been so exposed and remained unsold, and under the statute regulating the sales of public lands it would seem that unoffered land could not be purchased at any price or in any manner in advance of the public sale, while offered land was at all times subject to purchase by the first applicant at a fixed price. *Johnson* v. *Towsley*, 13 Wall. 72, 88.

By the act approved September 4, 1841, c. 16, entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant preëmption rights," 5 Stat. 453, there was granted, by the tenth section thereof, to every person being the head of a family, etc., "who since the first day of June, A.D. eighteen hundred and forty, has made or who shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office

for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions," etc.

By this section it will be seen that the right of preëmption was extended equally to unoffered and offered lands.

By section 14 it was provided, however, that the selection of unoffered lands should not delay the sale of such lands beyond the time which might be appointed by the proclamation of the President, nor should the provisions of the act be available to any person who should fail to make the proof and payment and file the affidavits required, under section 13 of the same act, before the day appointed for the commencement of the sales.

In regard to the so-called offered lands, it was provided by section 15 of the act as follows:

"SEC. 15. *And be it further enacted*, That whenever any person has settled or shall settle and improve a tract of land, subject at the time of settlement to private entry, and shall intend to purchase the same under the provisions of this act, such person shall in the first case, within three months after the passage of the same, and in the last within thirty days next after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser."

The result of the passage of this act was to grant the right to preëmpt 160 acres of either offered or unoffered land, and

that as to the unoffered lands the filing of a preëmption declaratory statement was not required, and the right of the preemptor to make due proof and payment remained until the time fixed by the proclamation of the President for the public sale of lands, at which time (if the proper proof and payment had not been made) the lands might be offered and sold to the highest bidder, and if not sold they would become subject to private entry by the first applicant at the minimum price. As to the offered lands, the right of the preëmptor was dependent upon his filing a declaratory statement in the local office, as stated in section 15 of the act above quoted.

By the fifth section of the act approved March 3, 1843, c. 86, 5 Stat. 619, it was provided that settlers under the preemption act of 1841, upon unoffered land, should "make known their claims, in writing, to the register of the proper land office, within three months from the date of this act when the settlement has already been made, and within three months from the time of the settlement when such settlement shall hereafter be made, giving the designation of the tract and the time of settlement; otherwise his claim to be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who shall have given such notice and otherwise complied with the conditions of the law."

Taking these two acts of 1841 and 1843 and reading them together, it is seen that there was a difference between unoffered and offered lands by reason of the fact that on unoffered lands the right or privilege to secure land by a preëmption filing continued up to the commencement of the public sale whenever that might be, and if that right or privilege had not been exercised and the land was offered at public sale and not sold, it then became subject to private entry by the first applicant, while on offered lands the right or privilege to secure them by a preëmption filing continued for twelve months after the date of the settlement, and if the preëmptor failed to file the declaratory statement or make the proper affidavit within the twelve months, "the tract of land so settled and improved shall be subject to the entry of any other purchaser."

Congress by an act approved May 20, 1862, c. 75, 12 Stat. 392, provided for the sale of public lands for homesteads, and since that time the practice of disposing of the public lands at public sale has gradually been abandoned, although the authority remained. The abandonment of these public sales resulted in giving to those who had made preëmption filings upon unoffered land an uncertain time within which to prove or complete their proof and payment, because their time lasted until the day of the public sale proclaimed by the President. As these public sales were abandoned, the result was that these claimants were not under any obligation to make proof and payment at all.

By the second section of the act approved July 14, 1870, c. 272, 16 Stat. 279, it was provided that "all claimants of preëmption rights shall hereafter, when no shorter period of time is now prescribed by law, make the proper proof and payment for the lands claimed, within eighteen months after the date prescribed for filing their declaratory notices shall have expired: *Provided*, That where said date shall have elapsed before the passage of this act, said preëmptors shall have one year after the passage hereof in which to make such proof and payment."

That act was amended by resolution No. 52, approved March 3, 1871, 16 Stat. 601, by which twelve months in addition to that provided in the act were given to claimants to make proof and payment. Adding the twelve months given by this resolution to the eighteen months given by the act of 1870, all claimants of preëmption rights were given thirty months to make the proper proof and payment for the lands claimed.

These various provisions are found in the United States Revised Statutes from section 2257 to and including section 2267, the latter section giving the thirty months as stated.

We thus find that since 1871 all claimants of preëmption rights lost those rights by operation of law, unless within thirty months after the date prescribed for filing their declaratory notices they made proper proof and payment for the lands claimed. The filing of their declaratory statement,

and the record made in pursuance of that filing became without legal value if within the time prescribed by the statute proper proof and payment were not made. Whether such proof and payment were made would be matter of record, and if they were not so made the original claim was cancelled by operation of law, and required no cancellation on the records of the land office to carry the forfeiture into effect. The law forfeited the right and cancelled the entry just as effectually as if the fact were evidenced by an entry upon the record. The mere entry would not cause the forfeiture or cancellation. It is the provision of law which makes the forfeiture, and the entries on the record are a mere acknowledgment of the law, and have in and of themselves, if not authorized by the law, no effect. The law does not provide for such a cancellation before it is to take effect. The expiration of time is a most effective cancellation.

In such a case as this, where the forfeiture occurs by the expiration of the thirty months within which to make proof and payment, the record shows that the claim has expired; that it no longer exists for any purpose, and therefore it cannot be necessary in order that the law shall have its full operation that an acknowledgment of the fact should be made by an officer in the land office. The law is not thus subject to the act or the omission to act of that officer.

The case of *Whitney* v. *Taylor*, 158 U. S. 85, cited in the opinion of the Circuit Court of Appeals as decisive of the case at bar, we think has not the effect given to it by the learned court below. The land in that case was within the granted limits of the grant to the Central Pacific Railroad Company by the act of July 1, 1862, c. 120, 12 Stat. 489. That company filed its map of definite location March 26, 1864. It was held that the tract being subject to the preëmption claim of one J., at the time when the grant to the railroad company took effect, was excepted from the operation of that grant. It was subject to the claim of J. because in May, 1857, he had filed his statement, paid the fees required by law, and the filing was duly entered in the proper government record; and at that time, as has been seen by the above review of the stat-

utes, there was no period within which a preëmptor was compelled to prove up and pay for his claim, except that it should be done before the land was offered at public sale by the proclamation of the President. The tract in dispute had not been so offered at the date of the definite location of the road, and it was held that J.'s time to make proof and payment had not expired at the time of the filing of the map of definite location, and that consequently his was an existing claim of record at that date.

The citation from the opinion of the court in *Whitney* v. *Taylor* shows that the statement was made with reference to that important and material fact; that it was an existing claim on the part of the claimant at the time of the filing of the map of definite location. Whether that claim were an enforceable one or whether there were facts which when brought to the attention of the Government might induce it to cancel it, or the fact that the Government might at its own suggestion cancel the claim, were held not to affect the question. The material fact that it was an existing claim was the fact upon which the case was decided.

In this case, such fact does not exist. There was no existing claim at the time of the filing of the map of definite location by the plaintiff herein. It had expired and become wholly invalid by operation of law. The thirty months had expired years before the filing of this map.

In *Northern Pacific Railroad Company* v. *Colburn*, 164 U. S. 383, 388, it was stated in the course of the opinion that there were "other questions in this case, such as the significance of an *expired filing*," which were not considered by the Supreme Court of the State or noticed by counsel, and which were left for consideration thereafter. This shows that the case of *Whitney* v. *Taylor* was not regarded by the court, or by the justice who wrote the opinion therein, as having a controlling bearing upon the question as to the effect of an expired filing under circumstances such as are developed in this case.

If claims which were of such a nature as to be described as "existing" were made in regard to any of the lands which

otherwise might be included in the grant to the railroad company, we reiterate what was said in the *Dunmeyer case*, that it is not conceivable that Congress intended to place those parties, the railroad company and the various claimants to the land, in the attitude of contestants, with the right in each to require proof from the other of complete performance of its obligations. On the contrary, we would say that if there were at the time of the filing of the map of definite location an actual existing claim, even though it might turn out to be wholly unfounded, the land thus claimed would not pass by the grant. This has been decided as lately as *Northern Pacific Railroad Company* v. *Sanders*, 166 U. S. 620. In the case under consideration there was, at the time of the filing of the map of definite location, no claim within the meaning of the statute.

The right of Flett, obtained by the filing of his statement, was the right of preëmption only. In other words, the right of purchase before any other person, and by the law of Congress that right ceased at the expiration of thirty months from the filing of that statement. Thereafter there was no claim, for it had ceased and determined, and with reference to the right it was of no more validity after the expiration of that time than if the statement had never been filed. After the filing of a statement and while the time is running within which to make proof, there is an inchoate right on the part of the preëmptor which the Government recognizes, as in *Frisbie* v. *Whitney*, 9 Wall. 187.

It was held in *Johnson* v. *Towsley*, 13 Wall. 72, 90, that in case the preëmptor failed to file his declaration of intention within three months from the time of settlement, as provided for in the fifth section of the act of 1843, c. 86, 5 Stat. 619, 620, he nevertheless would have the right after the expiration of the three months, being in possession, to then make and file his declaration, provided no other party had made a settlement or had given notice of his intention to make one and no one would be injured by the delay. But the case is far from holding that after the declaration has been filed and the time in which to prove up and make pay-

ment upon his claim has wholly expired, the claim nevertheless still exists in sufficient force to prevent the transfer of title to the company under the act of Congress, simply because the officer of the land office has failed to perform a mere ministerial duty by cancelling of record a claim which has really ceased to exist by operation of law. A claim is not an existing one where by the record it appears that the right to make proof and payment has expired under the terms of the statute.

It appears that it has not been the practice of the Interior Department to enter any formal cancellation of an expired preëmption filing upon the books of the office; its practice has been to take no action concerning them. They have simply been treated as abandoned claims. *State of Alabama*, 3 L. D. 315, 317.

Reference is made in the briefs to the circular of Commissioner Drummond, dated September 8, 1873, in which he says:

"By the operation of law limiting the period within which proof and payment must be made in preëmption cases, such claims are constantly expiring, the settler not appearing within such time to consummate his entry. These expired filings are classed with those actually abandoned or relinquished."

And again in the circular of November 8, 1879, the Commissioner said:

"Where application is made by a railroad company to select lands on which preëmption filings have heretofore been made and cancelled, or where the same have expired by limitation of law, no other claim or entry appearing of record, you will admit the selections, in accordance with the rules governing in the premises herein communicated. No proofs by the companies concerning such claims will hereafter be required."

The effect given by the land department to what is termed an "expired filing" of the nature of the one in suit has not been uniform. It was in substance held in some cases that such expired filing amounted to a claim within the meaning

of the statute, and that the land did not pass under the grant to the railroad company. *Emmerson* v. *Central Pacific Railroad Company*, 3 L. D. 117; same case on motion for a rehearing, 3 L. D. 271; *Schetka* v. *Northern Pacific Railroad Company*, 5 L. D. 473; *Allen* v. *Northern Pacific Railroad Company*, 6 L. D. 520; *Fish* v. *Northern Pacific Railroad Company*, 21 L. D. 165; same case on motion for a rehearing, 23 L. D. 15. On the other hand, we have been referred to the cases of *Northern Pacific Railroad Company* v. *Stovenour*, 10 L. D. 645; *Meister* v. *St. Paul &c. Railroad Company*, 14 L. D. 624; *Union Pacific Railroad Company* v. *Hartwich*, 26 L. D. 680; *Wight* v. *Central Pacific Railroad Company*, 27 L. D. 182; *Central Pacific Railroad Company* v. *Hunsaker*, 27 L. D. 297. The last two cases cited touch the question very remotely, if at all.

The latest decision of the land office to which our attention has been called is that of *Union Pacific Railroad Company* v. *Fisher*, decided February 1, 1889. 28 L. D. 75. In that case the Secretary refers to the cases which have been cited above, holding that an expired filing excepted the land from a grant to the railroad company, and he gives his reasons for the decisions of the department in those cases, which he thinks render them not altogether in conflict with the other decisions of the department.

Although these decisions are somewhat inharmonious, it would seem that the practice of the department not to enter as cancelled an expired filing has been uniform, and the record has been left to speak for itself.

For the reasons which we have already given, we think it was unnecessary to enter the cancellation on the record of the office in order to permit the law of Congress to have its legal effect. That effect should not be dependent upon the action or non-action of any officer of the land department. When no proof and no payment have been made within the time provided for by the law, the record will show that fact, and that the right of the claimant has expired and the claim itself has ceased to exist.

A case of this kind, which simply necessitates a reference

to the record to ascertain whether the filing had expired and with it the rights of the claimant, differs from the case where a filing may have become subject to cancellation; but the record does not show it, and the right to cancel depends upon evidence to be found *dehors* the record. In such case, while the facts might invalidate the claim, yet as they are not of record and require to be ascertained, the claim itself, though possibly not enforceable, is still an existing claim within the meaning of the law, and it would remain such until cancellation had taken place or some other act done legally terminating the existence of the claim.

Upon the facts as found in this case, it seems to us that there was no claim against the land at the time of the passage of the act of 1864, and that years before the time of the filing of the map of definite location in 1884 the claim that once existed (in 1869) in favor of Flett had ceased to exist in fact and in law, and the title to the land passed to the railroad company by virtue of the grant contained in the act of 1864 and by reason of the filing of its map of definite location March 26, 1884. When, therefore, the defendant settled upon the land in April, 1886, and applied to make homestead entry thereon, his application was rightfully rejected for the reason that title to the land had passed to the railroad company, as above mentioned, and therefore he was not entitled to make the entry.

For the same reason, when John Flett, in September, 1887, submitted proof in support of his preëmption claim, founded upon his declaratory statement filed April 9, 1869, (and which claim he had abandoned since 1870,) he was too late. His right had expired many years before 1884, at which time the right to the land passed to the company, and he had no right to prove up on his abandoned and expired claim.

The record shows that at the time of the commencement of this action the railroad company was the owner and entitled to the immediate possession of the land in controversy, and that it was entitled therefore to judgment in its favor, and the courts below erred in dismissing its complaint.

Syllabus.

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit is reversed, and the case remanded to the Circuit Court for the Western Division, District of Washington, for further proceedings not inconsistent with the opinion of this court.

MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA dissented.